



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

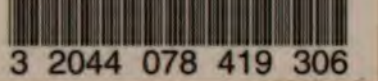
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>





**HARVARD LAW SCHOOL  
LIBRARY**





98  
July 31

# MINNESOTA REPORTS

VOL. 128

---

CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF MINNESOTA

DECEMBER 18, 1914—MARCH 5, 1915

---

HENRY BURLEIGH WENZELL  
REPORTER

---

LAWYERS' CO-OPERATIVE PUBLISHING CO.  
ST. PAUL  
1915

**COPYRIGHT 1915**

**BY**

**JULIUS A. SCHMAHL**

**SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE  
PEOPLE OF SAID STATE**

**(128 M.)**

**AUG 4 1915**

JUSTICES  
OF  
THE SUPREME COURT  
OF MINNESOTA  
DURING THE TIME OF THESE REPORTS

---

Hon. CALVIN L. BROWN, Chief Justice

Hon. GEORGE L. BUNN

Hon. PHILIP E. BROWN<sup>1</sup>

Hon. ANDREW HOLT

Hon. OSCAR HALLAM

Hon. ALBERT SCHALLER<sup>2</sup>

---

COMMISSIONERS

appointed under Laws 1913, p. 53, c. 62

Hon. MYRON D. TAYLOR

Hon. HOMER B. DIBELL

---

IRVING A. CASWELL, Esq., Clerk

---

ATTORNEY GENERAL

Hon. LYNDON A. SMITH

<sup>1</sup> Died February 6, 1915.

<sup>2</sup> Appointed February 25, 1915, to fill the vacancy caused by the death of Associate Justice Brown.

## NOTE

---

*By G. S. 1913, § 137, the reporter is required to report all cases decided by the court.*

*Pursuant to G. S. 1913, § 123, the headnote in each case is prepared by the justice or commissioner writing the opinion, except where otherwise noted.*

*With a few exceptions the cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in ( ). The cases are from the October, 1914, term calendar.*

*As required by G. S. 1913, § 137, when any Minnesota case has been printed in the periodical known as "The Northwestern Reporter," and is cited in any opinion in this volume, a reference to the book and page of that periodical where such case appears has been inserted in such opinion. A similar citation for each opinion in this volume has been given in a footnote.*

*In citations from the first twenty volumes of the Minnesota Reports the page of the original edition is given, preceded by the corresponding page of the edition by Chief Justice Gilfillan.*

*The footnotes in the present volume which are preceded by the word "Note" are inserted by the publisher pursuant to the terms of paragraph 4 of its contract dated May 8, 1909, with the Secretary of State.*

# CASES REPORTED

---

	Page		Page
<b>A</b>			
American Radiator Co. (Win-		Blakely v. J. Neils Lumber	
ters v.) . . . . .	508	Co. . . . .	465
Andersch, (Lamoreaux v.)..	261	Block v. Minnesota Farmers	
Anderson v. Meyer . . . . .	534	Brick & Tile Co. . . . .	71
Anderson, (Murphy v.) ....	106	Bombolis v. Minneapolis &	
Arveson v. Boston Coal Dock		St. L. R. Co. . . . .	112
& Wharf Co. . . . .	178	Boston Coal Dock & Wharf	
<b>B</b>			
Badger, (Butler v.) . . . . .	99	Co. (Arveson v.) . . . . .	178
Baker v. Schulz . . . . .	538	Bowser (S. F.) & Co. v.	
Baker, (Young v.) . . . . .	398	Fountain . . . . .	198
Bankers Mutual Casualty		Bragg & Co. v. Goldstein ...	64
Ins. Co. (Thompson v.)..	474	Brandenburg v. Northwestern	
Barnum v. White . . . . .	58	Jobbers Credit Bureau ...	411
Bauer v. Great Northern Ry.		Brastad, (Otter Tail Power	
Co. . . . .	146	Co. v.) . . . . .	415
Bemis, (Gray v.) . . . . .	392	Bremer, (Engebretson v.) ..	232
Bentson, (Mundwiler v.)...	69	Brennan v. Keating . . . . .	49
Berg v. Pittsburgh Construc-		Brooks-Scanlon Lumber Co.	
tion Co. . . . .	408	(State v.) . . . . .	300
Bernardy, (Red River Potato		Brust, (Prokosch v.) . . . . .	324
Growers Assn. v.) . . . . .	153	Butler v. Badger . . . . .	99
Bernstein v. City of Minne-		<b>C</b>	
apolis . . . . .	532	Capital Trust Co. v. Great	
		Northern Ry. Co. . . . .	537

	Page		Page
Carlson v. Elwell .....	440	Crookston Lumber Co. (Pe-	
Carnegie v. Great Northern		tra v.) .....	479
Ry. Co. ....	14	Crookston Lumber Co. (Val-	
Cary, (State v.) .....	481	ley v.) .....	387
Cherpeski v. Great Northern		Cummings, (Twitchell v.) ..	391
Ry. Co. ....	360	Curry, (Daly v.) .....	449
Chicago, M. & St. P. Ry. Co.			
(Shama v.) .....	522		
Chicago, M. & St. P. Ry. Co.			
(State ex rel. Smith v.) ..	25		
Chicago, St. P. M. & O. Ry.			
Co. (Doran v.) .....	193		
Christenson, (Madson v.) ..	17		
City of Duluth, (Watson v.)	446		
City of Minneapolis, (Bern-			
stein v.) .....	532		
City of Minneapolis, (Cowles			
v.) .....	452		
City of Minneapolis, (Nood-			
elman v.) .....	531		
City National Bank of Du-			
luth, (McCoy v.) .....	455		
City of St. Paul, (Kimball			
v.) .....	95		
City of St. Paul, (Midway			
Realty Co. v.) .....	135		
City of St. Paul, (State ex			
rel. Smith v.) .....	82		
Conforth, (Schaar v.) .....	460		
Corporation Securities Co.			
(First National Bank of			
Hastings v.) .....	341		
Cowden, (Pioneer Loan &			
Land Co. v.) .....	307		
Cowles v. City of Minneapolis	452		

## D

Daly v. Curry .....	449
Davis v. Great Northern Ry.	
Co. (Haynes Case) .....	354
Davis v. Great Northern Ry.	
Co. (Wesse Case) .....	536
Davison v. Ressler .....	204
Diessner, (Ziemon v.) .....	535
District Court of Hennepin	
County, (State ex rel. Law-	
ton v.) .....	530
District Court of Hennepin	
County, (State ex rel.	
Spaldy v.) .....	338
District Court of Meeker	
County, (State ex rel. Nel-	
son-Spelliscy Imp. Co. v.)	221
District Court of Ramsey	
County, (Kafka v.) .....	432
District Court of St. Louis	
County, (State ex rel. Vir-	
ginia & Rainy Lake Co. v.)	43
District Court of Sibley	
County, (State ex rel. Gay-	
lord Farmers Co-operative	
Creamery Assn. v.) .....	486

	Page		Page
Doran v. Chicago, St. P. M. & O. Ry. Co. ....	193	Goodspeed, (Minneapolis, St. P., R. & D. Ele. T. Co. v.)	66
Duel, (Schulz v.) .....	213	Graseth v. Northwestern Knitting Co. ....	245
Duluth Log Co. (Kenny & Anker v.) .....	5	Gray v. Bemis .....	392
Duluth Street Ry. Co. (State ex rel. Smith v.) .....	314	Great Northern Hotel Co. (H. W. Johns-Manville Co. v.) .....	311
Dybvig v. Minneapolis Sana- torium .....	292	Great Northern Ry. Co. (Bauer v.) .....	146
<b>E</b>		Great Northern Ry. Co. (Capital Trust Co. v.) ...	537
Ellefson, (Winters v.) .....	3	Great Northern Ry. Co. (Carnegie v.) .....	14
Elwell, (Carlson v.) .....	440	Great Northern Ry. Co. (Cherpeski v.) .....	300
Engebretson v. Bremer .....	232	Great Northern Ry. Co. (Davis v.) (Haynes Case)	354
Ewert v. Minneapolis & St. L. R. Co. ....	77	Great Northern Ry. Co. (Davis v.) (Wesse Case)	536
<b>F</b>		Great Northern Ry. Co. (Hanson v.) .....	122
Finch, Van Slyck & McCon- ville v. Le Sueur County Co-operative Co. ....	73	Great Northern Ry. Co. (Johnson v.) .....	365
First National Bank of Hast- ings v. Corporation Securi- ties Co. ....	341	Great Northern Ry. Co. (Kommerstad v.) .....	505
Flockey, (State v.) .....	40	Great Northern Ry. Co. (Lundeen v.) .....	332
Fortier v. Parry .....	235	Great Northern Ry. Co. (Otos v.) .....	283
Fountain, (S. F. Bowser & Co. v.) .....	198	Great Northern Ry. Co. (Padrick v.) .....	228
<b>G</b>		Great Northern Ry. Co. (Raski v.) .....	129
Goldstein, (Bragg & Co. v.)	64		



	Page		Page
Kommerstad v. Great North- ern Ry. Co. ....	505	Meyer v. Saterbak .....	304
L		Midway Realty Co. v. City of St. Paul .....	135
		Milton v. Greer .....	533
		Minneapolis Cedar & Lumber Co. (Traxler v.) .....	295
		Minneapolis & St. L. R. Co. (Bombolis v.) .....	112
		Minneapolis & St. L. R. Co. (Ewert v.) .....	77
		Minneapolis, St. P. R. & D. Ele. T. Co. v. Goodspeed ..	66
		Minneapolis, St. P. R. & D. Ele. T. Co. v. Grimes ....	321
		Minneapolis Sanatorium, (Dybvig v.) .....	292
		Minnesota Farmers Brick & Tile Co. (Block v.) .....	71
		Minnesota Farmers Mutual Ins. Co. (Johnson v.) ....	1
M		Minnesota Tax Commission, (State ex rel. St. Paul City Ry. Co. v.) .....	384
		Moe v. Paulson .....	277
		Mundwiler v. Bentson .....	69
		Municipal Court of City of Duluth, (State ex rel. Great Northern Ry. Co. v.)	225
		Murphy v. Anderson .....	106
		N	
		National Council of Knights and Ladies of Security, (Rigler v.) .....	51
Lamoreaux v. Andersch ....	261		
Lamont v. Lamout .....	525		
Lansing v. Gregory .....	496		
Lauer Brothers, (Velin v.)..	10		
Le Sueur County Co-operative Co. (Finch, Van Slyck & McConville v.) .....	73		
Love, (Kipp v.) .....	498		
Lucker, (Victor Talking Ma- chine Co. v.) .....	171		
Lundeen v. Great Northern Ry. Co. ....	332		
Lyons, (Heide v.) .....	488		
Lyons v. Westerdahl .....	288		
M			
McCoy v. City National Bank of Duluth .....	455		
McLarne, (State v.) .....	163		
Madson v. Christenson ....	17		
Marion, (Hanson v.) .....	468		
Meeker County Abstract & Loan Co. (Hunt v.) .....	207		
Meeker County Abstract & Loan Co. (Hunt v.) .....	539		
Merriam Realty Co. (Sperry Realty Co. v.) .....	217		
Meyer, (Anderson v.) .....	534		





V		Page
Val Blatz Brewing Co.		
(Klink v.) .....	144	
Valley v. Crookston Lumber Co. ....	387	
Velin v. Lauer Brothers ...	10	
Victor Talking Machine Co. v. Lucker .....	171	
Village of Kasota, (Klaseus v.) .....	47	
Virgens, (State v.) .....	422	
W		
Wadsworth v. Walsh .....	241	
Walsh, (Wadsworth v.) ....	241	
Watson v. City of Duluth ..	446	
Westerdahl, (Lyons v.) ....	288	
White, (Barnum v.) .....		58
Wilkes v. Holmes .....		349
Williams, (Northwestern Marble & Tile Co. v.) ....		514
Winters v. American Radiator Co. ....		508
Winters v. Ellefson .....		3
Wortz v. Wortz .....		251
W. J. Jennison Co. (Kohler v.) .....		133
Y		
Young v. Baker .....		398
Z		
Ziemon v. Diessner .....		535

# MINNESOTA CASES CITED BY THE COURT

	Page		Page
Adams v. Castle, 64 Minn. 505,	414	Berg v. Pittsburgh Construction Co.	
A. J. Dwyer Pine Land Co. v. White-		128 Minn. 408,	459
man, 92 Minn. 55,	399	Berger v. Turnblad, 98 Minn. 103,	266
Alexander v. Thompson, 42 Minn.		Bergh v. Sloan, 53 Minn. 116,	274
498,	244	Bergquist v. City of Minneapolis, 42	
American Bridge Co. of New York v.		Minn. 471,	411
American District Steam Co. 107		Bergstrom v. Johnson, 111 Minn.	
Minn. 140,	203	247,	111
Ames v. Benjamin, 74 Minn. 335,	161	Bertram v. Bemidji Brewing Co. 123	
Anderson v. Fred Johnson Co. 116		Minn. 76,	274
Minn. 56,	206	Blakely v. J. Neils Lumber Co. 114	
Anderson v. Pittsburgh Coal Co. 108		Minn. 523,	466
Minn. 455,	184	Blakely v. J. Neils Lumber Co. 121	
Arthur v. St. Paul & D. R. Co. 38		Minn. 280,	465, 466
Minn. 95,	517	Blom v. Yellowstone Park Assn. 86	
Arveson v. Boston Coal Dock &		Minn. 237,	248, 299
Wharf Co.	178	Blyhl v. Village of Waterville, 57	
Aske v. Duluth & Iron Range R. Co.		Minn. 115,	48, 448
83 Minn. 197,	24	Board of Education of Town of	
Associated Schools of I. D. No. 63		Sauk Centre v. Moore, 17 Minn.	
of Hector v. School District No.		391 (412),	85
83 of Renville County, 122 Minn.		Bolles v. Sachs, 37 Minn. 315,	495
254,	85	Boogren v. St. Paul City Ry. Co. 97	
Babcock v. Murray, 58 Minn. 385,	520	Minn. 51,	356, 359
Backus v. Burke, 63 Minn. 272,	258	Boos v. Minneapolis, St. P. & S. S.	
Bacsetti v. Shenango Furnace Co.		M. Ry. Co. 127 Minn. 381,	331
122 Minn. 335,	465	Bott v. Pratt, 33 Minn. 323,	462
Bahr v. Northern Pacific Ry. Co. 101		Bowen v. City of Minneapolis, 47	
Minn. 314,	24, 198	Minn. 115,	436
Baldwin v. Fisher, 110 Minn. 186,		Bragg v. Chicago, M. & St. P. Ry.	
152,	153	Co. 81 Minn. 130,	515
Banks v. Pennsylvania R. Co. 111		Bremer v. Minneapolis, St. P. & S.	
Minn. 48,	524	S. M. Ry. Co. 96 Minn. 469,	336
Barg v. Bousfield, 65 Minn. 355,	46	Brosius v. Evans, 90 Minn. 521,	473
Bates v. B. B. Richards Lumber Co.		Brown v. Douglas Lumber Co. 113	
56 Minn. 14,	274	Minn. 67,	46
Bell v. Lang, 83 Minn. 228,	410, 411	Brown v. Hoag, 35 Minn. 373, 141,	472
Bemis v. Northwestern Trust Co. 117		Brown v. Munger, 42 Minn. 482,	345
Minn. 409,	393	Brown v. Strom, 113 Minn. 1,	5
Beneke v. Beneke, 119 Minn. 441,	497	Browning v. Hinkle, 48 Minn. 544,	459
Bennett v. Great Northern Ry. Co.		Brunette v. Minneapolis, St. P. & S.	
115 Minn. 128,	11	S. M. Ry. Co. 118 Minn. 444,	161
Bennett v. Harrison, 115 Minn. 342,	127	Buchanan v. Reid, 43 Minn. 172,	258
		Burns v. Sewell, 48 Minn. 425,	265

	Page		Page
Capehart v. Foster, 61 Minn. 132,	289, 291	Dobreff v. St. Paul Gaslight Co. 127	300
Carlson v. Haglin, 95 Minn. 347,	73	Earl Fruit Co. v. Thurston Cold	
Chadbourne v. Reed, 83 Minn. 447,	78	Storage & Warehouse Co. 60 Minn.	
Chase v. Whitten, 62 Minn. 498,	35	351,	202
Christenson v. American Express Co.		Ecker v. Isaacs, 98 Minn. 146,	306
15 Minn. 208 (270),	516	Elenduck v. Crookston Lumber Co.	
City of Crookston v. Board of Co.		121 Minn. 53,	184
Commrs. of Polk County, 79 Minn.		Elwell v. Goodnow, 71 Minn. 383,	156
283,	303	Emery v. Hertig, 60 Minn. 54,	266
City of Duluth v. Duluth St. Ry. Co.		Englund v. Minneapolis, St. P. & S.	
60 Minn. 178,	316	S. M. Ry. Co. 108 Minn. 380,	206
City of St. Paul v. Kuby, 8 Minn.		Ericson v. Duluth & Iron Range R.	
125, 130 (154),	448	Co. 57 Minn. 26,	462
City of Winona v. School District,		Ertz v. Produce Exchange of Min-	
No. 82, Winona County, 40 Minn.		neapolis, 79 Minn. 140,	177
13,	86	Eyre v. City of Faribault, 121 Minn.	
Clay v. Chicago, M. & St. P. Ry. Co.		233,	436
104 Minn. 1,	230	Fairchild v. Fleming, 125 Minn. 431,	464
Coles v. Shepard, 30 Minn. 446,	191	Falkenberg v. Bazille & Partridge,	
Combination Steel & Iron Co. v. St.		124 Minn. 19,	300
Paul City Ry. Co. 52 Minn. 203,	265	Faunce v. Searles, 122 Minn. 343,	177
Comstock v. Comstock, 76 Minn. 396,	21	Ferguson v. Trovaten, 94 Minn. 209,	141
Coursolle v. Weyerhaeuser, 69 Minn.		Finnes v. Selover, Bates & Co. 102	
328,	502	Minn. 334,	39
Cousins v. Illinois Central R. Co. 126		First Nat. Bank of Rock Island v.	
Minn. 172,	120	Loyhed, 28 Minn. 396,	75
Cram v. Thompson, 87 Minn. 172,		First State Bank of Storden v.	
468, 470, 471,	473	Pederson, 123 Minn. 374,	459
Crow River Valley Creamery Co. v.		Fischer v. Sperl, 94 Minn. 421,	516
Strande, 104 Minn. 46,	75	Fisk v. Stewart, 24 Minn. 97,	127
Crowley v. Burns Boiler & Mnfg. Co.		Fiske v. Lawton, 124 Minn. 85,	531
100 Minn. 178,	24	Fohl v. Chicago & N. W. Ry. Co. 84	
Cruikshank v. St. Paul F. & M. Ins.		Minn. 314,	516
Co. 75 Minn. 266,	11, 516	Foot v. Great Northern Ry. Co. 81	
Culligan v. Cosmopolitan Co. 126		Minn. 493,	118
Minn. 218,	504	Fortmeyer v. National Biscuit Co.	
Culver v. Hardenbergh, 37 Minn.		116 Minn. 158,	99
225,	116	Foster v. Brick, 121 Minn. 173,	400
Curryer v. Merrill, 25 Minn. 1,	85	Foster v. Clifford, 110 Minn. 79,	504
Daly v. Curry, 128 Minn. 449,	464	Freeburg v. Honemann, 126 Minn.	
Davidson v. Flour City Ornamental		52,	400
Iron Works, 107 Minn. 17,	462	Fritz v. Fritz, 94 Minn. 264,	61
Davis v. Great Northern Ry. Co. 128		Gaar, Scott & Co. v. Fritz, 60 Minn.	
Minn. 354,	536	346,	306
Davison v. Resaler, 128 Minn. 204,	481	Gamble-Robinson Commission Co. v.	
Day v. Duluth St. Ry. Co. 121 Minn.		Northern Pacific Ry. Co. 119 Minn.	
445,	462	40,	524
Deppe v. Ford, 89 Minn. 253,	156, 157	Gammons v. Gulbranson, 78 Minn.	
Desaman v. Butler Bros. 118 Minn.		21,	370
198,	350	Gammons v. Johnson, 69 Minn. 488,	370
Dickson v. Miller, 124 Minn. 346,		Gammons v. Johnson, 76 Minn. 76,	
252,	254	369, 370	
Dimond v. Manheim, 61 Minn. 178,		Gardner v. Leck, 52 Minn. 522,	263
259, 260		George A. Hormel & Co. v. American	
D. M. Osborne & Co. v. Josselyn, 92		Bonding Co. 112 Minn. 288,	275
Minn. 266,	174		

	Page		Page
G. Heileman Brewing Co. v. Peimeisl,		Howard v. Illinois Central R. Co.	
85 Minn. 121,	175	114 Minn. 189,	512, 513
Gillespie v. Great Northern Ry. Co.		Howe v. Minneapolis, St. P. & S. S.	
124 Minn. 1,	248	M. Ry. Co. 62 Minn. 71,	16
Gittens v. William Porten Co. 90		Howes v. Reliance Wire-Works Co.	
Minn. 512,	73	46 Minn. 44,	265, 266
Graham v. Savage, 110 Minn. 510,		Huber v. Johnson, 68 Minn. 74,	370
200, 202,	204	Hunt v. Meeker County Abstract &	
Grant v. City of Brainerd, 86 Minn.		Loan Co. 128 Minn. 207,	539
126,	447, 448	Hutchins v. St. Paul, M. & M. Ry.	
Grant v. Duluth M. N. R. Co. 66		Co. 44 Minn. 5,	335, 336
Minn. 349,	297	Hyatt v. Murray, 101 Minn. 507,	135
Gray v. St. Paul City Ry. Co. 87		In re Fanning, 40 Minn. 4,	157
Minn. 280,	334	In re Hess' Estate, 57 Minn. 282,	
Gregory v. Lansing, 115 Minn. 73,	380		277, 281
The Gregory Co. v. Shapiro, 125		In re Holt's Will, 56 Minn. 33,	
Minn. 81,	345, 347		191, 431
Griggs v. Fleckenstein, 14 Minn.		In re Lincoln Park, 44 Minn. 299,	
62 (81),	216		438, 439
Grout v. Stewart, 96 Minn. 230,	127	Iverson v. Cirkel, 56 Minn. 299,	
Guernsey v. American Ins. Co. 17			472, 473
Minn. 83 (104),	399	Jackson v. Board of Education of	
Gunderson v. Northwestern Ele. Co.		City of Minneapolis, 112 Minn.	
47 Minn. 161,	334	167,	87
Hagerty v. Evans, 87 Minn. 435,		Janochosky v. Kurr, 120 Minn. 471,	110
	73, 275	J. B. Inderrieden Co. v. J. C. John-	
Hanford v. St. Paul & Duluth R. Co.		son Co. 112 Minn. 469,	173
43 Minn. 104,	418	Jenkins v. Minneapolis & St. Louis	
Hanson v. Ingwaldson, 84 Minn. 346,	539	R. Co. 124 Minn. 368,	231
Hanson v. Nygaard, 105 Minn. 30,		Jensen v. Regan, 92 Minn. 323, 248,	249
	116, 117	John Paul Lumber Co. v. Hormel, 61	
Harding v. Great Northern Ry. Co.		Minn. 303,	266
77 Minn. 417,	478	Johnson v. Northern Pacific Ry. Co.	
Harriott v. Holmes, 77 Minn. 245,	282	125 Minn. 29,	206
Hayes v. Hayes, 126 Minn. 389,	530	Johnson v. Northwestern L. & B.	
Helmer v. Shevlin-Mathieu Lumber		Assn. 60 Minn. 393,	436
Co. 129 Minn. 25,	515	Johnson v. Sandhoff, 30 Minn. 197,	258
Herrick v. Minneapolis & St. L. Ry.		Johnson v. Starrett, 127 Minn. 138,	266
Co. 31 Minn. 11,	161	Johnson v. Stone, 111 Minn. 228,	353
Hewson-Herzog Supply Co. v. Minne-		Johnson v. United Flour Mills Co.	
sota Brick Co. 55 Minn. 530,	405	128 Minn. 297,	481
Hickey v. Collom, 47 Minn. 565,	265	Johnson v. Young, 127 Minn. 462,	
Hodge v. Eastern Ry. Co. of Minn.			450, 464
70 Minn. 193,	414	J. T. McMillan Co. v. State Board of	
Hogan v. Atlantic Ele. Co. 66 Minn.		Health, 110 Minn. 145,	224
344,	414	Jones v. Minnesota Transfer Ry.	
Holden v. Great Northern Ry. Co.		Co. 108 Minn. 129,	118
103 Minn. 98,	335	Joyce v. Great Northern Ry. Co. 100	
Holden v. Great Western Ele. Co. 69		Minn. 225,	177
Minn. 527,	74	Judson v. Great Northern Ry. Co.	
Holland v. Sheehan, 108 Minn. 362,	370	63 Minn. 248,	462
Homberger v. Brandenburg, 35 Minn.		Kappa v. Levstik, 123 Minn. 532,	306
401,	414	Kenrick v. Rogers, 26 Minn. 344,	414
Horgan v. Duluth Log Co. 120 Minn.		Kessler v. Smith, 42 Minn. 494, 203,	204
244,	9	Keyes v. Minneapolis & St. L. Ry.	
Horn v. Hansen, 56 Minn. 43,	495	Co. 36 Minn. 290,	129, 131
Howard v. Farr, 115 Minn. 86,	104		

	Page		Page
King v. Board of Education of City of Minneapolis, 116 Minn. 433,	68	McDonald v. City of Duluth, 93 Minn. 206,	48.
King v. Meighen, 20 Minn. 237 (264),	258	McDonough v. Cameron, 116 Minn. 480,	247
Kinzel v. Boston & Duluth Farm Land Co. 124 Minn. 416,	305	McHugh v. City of St. Paul, 67 Minn. 441,	448.
Klages v. Gillette-Herzog Mnfg. Co. 86 Minn. 458,	46	McKenna v. Chicago, M. & St. P. Ry. Co. 92 Minn. 508,	206
Kleis v. Travelers Ins. Co. 118 Minn. 422,	274	McKinnon v. Red River Lumber Co. 119 Minn. 479,	6, 10.
Kling v. Thompson-McDonald Lumber Co. 127 Minn. 468,	450, 464	McLoone v. Brusch, 119 Minn. 286,	119, 203
Knight v. Norris, 13 Minn. 438 (473),	263, 269	McMahon v. Davidson, 12 Minn. 232 (357),	529
Kommerstad v. Great Northern Ry. Co. 120 Minn. 370,	506	McMahon v. Illinois Central R. Co. 127 Minn. 1,	230, 331
Kronschnable v. Knoblauch, 21 Minn. 56,	414	McNamara v. Fink, 71 Minn. 66,	237
Krueger v. Market, 124 Minn. 393,	258	McVeigh v. Minneapolis & R. R. Ry. Co. 113 Minn. 450,	335
Krumdick v. Chicago & N. W. Ry. Co. 90 Minn. 260,	515	Maataja v. Saarenpaa, 118 Minn. 255,	191
Kulberg v. National Council of Knights and Ladies of Security, 124 Minn. 437,	53, 56	Macomber v. Kinney, 114 Minn. 146,	260
Kuschke v. City of St. Paul, 45 Minn. 225,	420	Mahoney v. Maxfield, 102 Minn. 377,	464
Lally v. Crookston Lumber Co. 85 Minn. 257,	473	Maki v. St. Luke's Hospital Assn. 122 Minn. 444,	390
Lammers v. Great Northern Ry. Co. 82 Minn. 120,	16	Marcus v. National Council of Knights and Ladies of Security, 123 Minn. 145,	53, 56.
Lamprey v. St. Paul & Chicago Ry. Co. 89 Minn. 187,	347	Marcus v. National Council of Knights and Ladies of Security, 127 Minn. 196,	53
Layman v. Minneapolis Realty Co. 60 Minn. 136,	61	Marengo v. Great Northern Ry. Co. 84 Minn. 397,	516
Lehmick v. St. Paul, S. & T. F. R. Co. 19 Minn. 406 (464),	68	Maroney v. Minneapolis & St. L. R. Co. 123 Minn. 480,	287
Le Mere v. Railway Transfer Co 125 Minn. 159,	246	Marple v. Minneapolis & St. L. R. Co. 115 Minn. 262,	390, 445
Liabraaten v. Minneapolis, St. P. & S. S. M. Ry. Co. 105 Minn. 207,	16	Marsh v. Herman, 47 Minn. 537,	411
Liljengren F. & L. Co. v. Mead, 42 Minn. 420,	200, 243	Martin v. Fridley, 23 Minn. 13,	258.
Lindvall v. Woods, 41 Minn. 212,	411	Mathison v. Minneapolis Street Ry. Co. 126 Minn. 286,	162, 221, 224
Lockway v. Modern Woodmen of America, 121 Minn. 170,	476	Mendenhall v. Ulrich, 94 Minn. 100,	200
Long v. City of Duluth, 49 Minn. 280,	317	Merchants Exchange Bank v. Luckow, 37 Minn. 542,	200, 202
Lufkin v. Harvey, 125 Minn. 458,	305	Merz v. Croxen, 102 Minn. 69,	414
Lundberg v. Minneapolis Iron Store Co. 115 Minn. 174,	206	Meshbesher v. Channellene Oil & Mnfg. Co. 107 Minn. 104,	462.
McCormick Harvesting Mach. Co. v. Wilson, 39 Minn. 467,	204	Metropolitan Music Co. v. Shirley, 98 Minn. 292,	473.
McCurdy v. Wallblonn Furniture & Carpet Co. 94 Minn. 326,	414	Midland Co. v. Eby, 89 Minn. 27,	237
McCutcheon v. Virginia & R. L. Co. 114 Minn. 226,	206	Mikiska v. Mikiska, 90 Minn. 258,	61
		Miller v. St. Paul City Ry. Co. 62 Minn. 216,	477
		Minneapolis Gaslight Co. v. City of Minneapolis, 123 Minn. 231,	392.

	Page		Page
Minneapolis Mill Co. v. Board of Water Commrs. of City of St. Paul, 56 Minn. 485.	418	Oelschlegel v. Chicago G. W. Ry. Co. 73 Minn. 327,	411
Minneapolis, St. P. R. & D. Ele. T. Co. v. St. Martin, 108 Minn. 494, 68,	323	Oertel v. Pierce, 116 Minn. 266, 109,	400
Minneapolis Threshing Mach. Co. v. Davis, 40 Minn. 110,	202	Olson v. McMullen, 34 Minn. 94,	206
Minneapolis Threshing Machine Co. v. Jones, 95 Minn. 127,	399	O'Malley v. St. Paul, M. & M. Ry. Co. 43 Minn. 289,	334
Minnesota Canal & Power Co. v. Fall Lake Boom Co. 127 Minn. 23,	418	Oppegaard v. Board of Commrs. of Renville County, 120 Minn. 443,	93
Minnesota Canal & Power Co. v. Koochiching Co. 97 Minn. 429,	417, 418	Osborne v. McMasters, 40 Minn. 103,	462
Minnesota Canal & Power Co. v. Pratt, 101 Minn. 197,	417, 418	Pabst Brewing Co. v. Jensen, 68 Minn. 293,	528
Minnesota Debenture Co. v. Johnson, 94 Minn. 150,	528	Pardoe v. Merritt, 75 Minn. 12,	501
Minnesota Valley R. Co. v. Doran, 17 Minn. 162 (188),	68	Peery v. Illinois Central R. Co. 123 Minn. 264,	120
Mitchell v. Mitchell, 43 Minn. 73,	104	Peterson v. Lundquist, 106 Minn. 339,	512
Morgan v. Brach, 104 Minn. 247,	493	Peterson v. Merchants Ele. Co. 111 Minn. 105,	281
Morin v. St. Paul, M. & M. Ry. Co. 33 Minn. 176,	528, 529	Petterson v. Butler Bros. 123 Minn. 516,	445
Moritz v. City of St. Paul, 52 Minn. 409,	436	Rail v. Little Falls Lumber Co. 47 Minn. 422,	353
Moulton v. Warren Mnfg. Co. 81 Minn. 259,	347	Rait v. New England F. & C. Co. 66 Minn. 76,	46
Mournin v. Trainor, 63 Minn. 230,	141	Rase v. Minneapolis, St. P. & S. S. M. Ry. Co. 118 Minn. 437,	390
Mueller v. Fruen, 36 Minn. 273,	153	Red River Potato Growers Assn. v. Bernardy, 126 Minn. 440,	155
Munsch v. Stelter, 109 Minn. 403,	152, 153	Reid v. Northwestern I. & W. Co. 79 Minn. 369,	201
Mutual Benefit Life Ins. Co. v. County of Martin, 104 Minn. 179,	386	Renlund v. Commodore Mining Co. 89 Minn. 41,	118
National German-American Bank v. Lawrence, 77 Minn. 282,	191	Rieck v. Schamanski, 117 Minn. 25,	512
Naylor v. Stene, 96 Minn. 57,	352, 353	Robbins v. St. Paul, Stillwater & T. F. R. Co. 22 Minn. 286,	419
Newhall v. Journal Printing Co. 105 Minn. 44,	176	Roberts v. Wallace, 100 Minn. 359,	211
Nicholson v. Congdon, 95 Minn. 188,	498, 501	Rock Island Plow Co. v. Peterson, 93 Minn. 356,	173
Niggeler v. Maurin, 34 Minn. 118,	127	Rogers v. Clark Iron Co. 104 Minn. 198,	498, 501, 502
Nippolt v. Firemen's Ins. Co. of Chicago, 57 Minn. 275,	202	Rogers v. Stevenson, 16 Minn. 56 (68),	473
Noodelman v. City of Minneapolis, 128 Minn. 531,	532	St. Anthony Falls Water-Power Co. v. Merriman, 35 Minn. 42,	61
Northern Trust Co. v. Markell, 61 Minn. 271,	347	St. Barnabas Hospital v. Minneapolis Int. Ele. Co. 68 Minn. 254,	176
Northrup v. Hayward, 99 Minn. 299,	275	Sache v. Wallace, 101 Minn. 169,	117
Njus v. Chicago, M. & St. P. Ry. Co. 47 Minn. 92,	161	Sallden v. City of Little Falls, 102 Minn. 358,	515
O'Brien v. City of St. Paul, 25 Minn. 331,	512	Samuel H. Chute Co. v. Latta, 123 Minn. 69,	200, 204
Oddie v. Mendenhall, 84 Minn. 58,	463	Sandwich Mnfg. Co. v. Earl, 56 Minn. 390,	51
O'Donnell v. Daily News Co. of Minneapolis, 110 Minn. 378,	473	Savino v. Griffin Wheel Co. 118 Minn. 290,	121
		Schoch v. Winona & St. Peter R. Co. 55 Minn. 479,	227

	Page		Page
Schroeder v. City of St. Paul, 115 Minn. 222,	87	State v. Erickson, 125 Minn. 238,	303
Schultz v. Minneapolis & St. L. R. Co. 123 Minn. 405,	196	State v. Gardner, 96 Minn. 318,	168
Schus v. Powers-Simpson Co. 85 Minn. 447,	445	State v. Gear, 29 Minn. 221,	170
Scott-Stafford Opera House Co. v. Minneapolis Musicians Assn. 118 Minn. 410,	177	State v. Henderson, 97 Minn. 369,	85
Seewald v. Schmidt, 127 Minn. 375,	507	State v. Laliyer, 4 Minn. 277 (368),	170
Sheehan v. Flynn, 59 Minn. 436,	512	State v. Leftwich, 41 Minn. 42,	156
Sheldon v. Brown, 72 Minn. 496,	353	State v. Minnesota Tax Commission, 117 Minn. 159,	386
Shepherd v. Ware, 46 Minn. 174,	528	State v. Nelson, 91 Minn. 143,	168
Shine v. Olson, 110 Minn. 44,	238	State v. O'Connor, 81 Minn. 79,	89
Shriver v. Sioux City & St. P. R. Co. 24 Minn. 506,	510	State v. Otis, 53 Minn. 318,	438
Sieber v. Great Northern Ry. Co. 76 Minn. 269,	335	State v. Powers, 69 Minn. 429,	538
Sims v. American Steel Barge Co. 56 Minn. 68,	275	State v. Probate Court of Hennepin County, 112 Minn. 279,	5, 383
Sloan v. Becker, 34 Minn. 491,	399	State v. Probate Court of County of Ramsey, 124 Minn. 508,	379
Slocum v. McLaren, 106 Minn. 386,	237	State v. Roby, 128 Minn. 187, 430,	431
Smith v. Barnes, 38 Minn. 240, 265,	267	State v. Sauer, 42 Minn. 258,	478
Smith v. City of St. Paul, 65 Minn. 295,	436	State v. Schueller, 120 Minn. 26,	188, 189
Smith v. Glover, 50 Minn. 58,	258	State v. Sharp, 121 Minn. 381,	303
Smith v. Jordan, 13 Minn. 246 (264),	62	State v. Shevlin-Carpenter Co. 99 Minn. 158,	303
Smith v. Mussetter, 58 Minn. 159,	200	State v. Stearns, 72 Minn. 200,	93
Smith v. Pearson, 44 Minn. 397,	274	State v. West Duluth Land Co. 75 Minn. 456,	87
Smithson v. Chicago Great Western Ry. Co. 71 Minn. 218,	79	State v. Willis, 61 Minn. 120,	155, 156, 157
Soutar v. Minneapolis International Ele. Co. 68 Minn. 18,	410, 411	Stebbins v. Martin, 121 Minn. 154,	516
Sperry v. Goodwin, 44 Minn. 207,	237	Stitt v. Rat Portage Lumber Co. 94 Minn. 529,	127
Sprague v. Wisconsin Cent. Ry. Co. 104 Minn. 58,	231, 286, 288	Stitt v. Rat Portage Lumber Co. 96 Minn. 27,	400
Stash v. Great Northern R. Co. 128 Minn. 329,	448	Stone v. Evans, 32 Minn. 243,	529
State v. Adamson, 43 Minn. 196,	478	Stone v. Harmon, 31 Minn. 512,	201
State v. Bazille, 97 Minn. 11,	383	Strand v. Great Northern Ry. Co. 101 Minn. 85,	430
State v. Board of Co. Commrs. of Renville County, 83 Minn. 65,	303	Stub v. Grimes, 38 Minn. 317,	353
State v. Brooks-Scanlon Lumber Co. 122 Minn. 400,	301	Sundvall v. Interstate Iron Co. 104 Minn. 499,	445
State v. Brooks-Scanlon Lumber Co. 128 Minn. 300,	383	Sutton v. Great Northern Ry. Co. 99 Minn. 376,	414
State v. Buckman, 95 Minn. 272,	302	Swanson v. Oakes, 93 Minn. 404,	335
State v. City of Mankato, 117 Minn. 458,	89, 91	Swedish American Nat. Bank of Minneapolis v. Chicago, B. & Q. Ry. Co. 96 Minn. 436,	430
State v. Consumers Power Co. 119 Minn. 225,	417	Tarras v. City of Winona, 71 Minn. 22,	448
State v. Crawford, 96 Minn. 95, 24,	168	Tatge v. Tatge, 34 Minn. 272,	473
State v. Creamery Package Mfg. Co. 115 Minn. 207,	175	Taylor v. Grand Lodge A. O. U. of Minn. 98 Minn. 36,	227
State v. District Court of Ramsey County, 75 Minn. 292,	436	Teal v. St. Paul City Ry. Co. 96 Minn. 379,	16
		Teal v. Scandinavian American Bank, 114 Minn. 435,	127, 400
		Tegels v. Great Northern Ry. Co. 120 Minn. 31,	335

	Page		Page
Theodore Wetmore & Co. v. Thur-		Waters v. Pioneer Fuel Co. 52 Minn.	
man, 121 Minn. 352,	305	474,	46, 509
Thomas v. Chicago Great Western		Weaver v. Mississippi & R. R. Boom	
R. Co. 112 Minn. 360,	335	Co. 30 Minn. 477,	420
Thomas Mnfg. Co. v. Knapp, 101		Webb v. Minneapolis Street Ry. Co.	
Minn. 432,	174	107 Minn. 282,	477
Thompson-McDonald Lumber Co. v.		Webster v. Chicago, St. P. M. & O.	
Morawetz, 127 Minn. 277,	266	Ry. Co. 119 Minn. 72,	196
Tilley v. Cobb, 56 Minn. 295,	79	Webster v. Luther, 50 Minn. 77,	501
Tomeczek v. Johnson, 110 Minn. 320,	206	Weicher v. Cargill, 86 Minn. 271,	358
Traak v. Graham, 47 Minn. 571,	310	Wentworth v. Tubbs, 53 Minn. 388,	263
True v. Northern Pacific Ry. Co.		West Duluth Land Co. v. Kurtz, 45	
126 Minn. 72,	39	Minn. 380,	327
Truntle v. North Star Woolen-Mill		Western Land Securities Co. v. Dan-	
Co. 57 Minn. 52,	248	iels-Jones Co. 113 Minn. 317,	473
Turritt v. Chicago, St. P. M. & O.		Westman v. Krumweide, 30 Minn.	
Ry. Co. 95 Minn. 408,	286	313,	200, 202
Tuttle v. Buck, 107 Minn. 145,	177	Weyl v. Chicago, M. & St. P. Ry.	
Union Central Life Ins. Co. v. Tag-		Co. 40 Minn. 350,	462
gart, 55 Minn. 95,	242	Wheaton Roller-Mill Co. v. John T.	
Vent v. Duluth Coffee & Spice Co.		Noye Mnfg. Co. 66 Minn. 156,	200
64 Minn. 307,	345	Whitaker v. Chicago, St. P. M. & O.	
Virtue v. Creamery Package Mnfg.		Ry. Co. 115 Minn. 140,	24, 280
Co. 123 Minn. 17,	178	Whitehead v. Wisconsin Central Ry.	
Wakefield v. Day, 41 Minn. 344,	399	Co. 103 Minn. 13,	231, 288
Walker v. St. Paul City Ry. Co. 52		Wiles v. Great Northern Ry. Co. 125	
Minn. 127,	50	Minn. 348,	49
Wall v. Meilke, 89 Minn. 232,	62, 399	Winters v. Minneapolis & St. Louis	
Walsh v. Selover, Bates & Co. 109		R. Co. 126 Minn. 260,	112, 118
Minn. 136,	39	Witt v. St. Paul & N. P. Ry. Co. 35	
Wanganstein v. Jones, 61 Minn.		Minn. 404,	68
262,	263	Wosika v. St. Paul City Ry. Co. 80	
Wann v. Northwestern Trust Co. 120		Minn. 364,	16
Minn. 493,	61	Young v. Baker, 128 Minn. 398,	538
Ward v. Hackett, 30 Minn. 150,	520		



## PROCEEDINGS

IN MEMORY OF

### ASSOCIATE JUSTICE BROWN

---

On the afternoon of April 6, 1915, in the Court Room at the State Capitol, HON. CHARLES M. START, formerly Chief Justice of the Supreme Court, addressed the Court, then in session, and said:

May it please your Honors:

Your committee to prepare a memorial of Justice Philip E. Brown has discharged the duty, and the Secretary of the Minnesota State Bar Association and of the committee, Mr. Caldwell, will now read it with your permission.

CHESTER L. CALDWELL, Esq., then read the following

#### MEMORIAL

Philip E. Brown was born on the nineteenth day of June, 1856, in the town of Shullsburg, Lafayette County, Wisconsin, and was the son of George O. and Sarah (Robson) Brown. He died February 6, 1915.

He was graduated from the University of Wisconsin and received his degree of Bachelor of Law from the Albany College of Law in 1881. The following year he began the practice of law at Luverne, Minnesota. In 1891 he was appointed judge of the Thirteenth Judi-

cial District. He was elected to that office in 1892 and re-elected in 1898 and 1904, which position he filled with marked ability until his election as Associate Justice of this court in November, 1910. He assumed the duties of that office in January, 1912, and remained a member of this court until his death.

He married Ellen Ford in 1882, who survives him.

Judge Brown was a plain man, retiring, unassuming and never sought public attention or applause. He was learned in the law, honest and conscientious both as a lawyer and a jurist. No man ever was more industrious or painstaking in his work. He never slighted any task. His days were spent in arduous and conscientious labor in the performance of his duties. He was possessed of strong common sense; a natural love for justice; always courteous and considerate; a patient and candid listener; firm and fearless in the discharge of his duties, both as a lawyer and a judge. He was a pronounced aid to both the Bench and Bar and his death is an irreparable loss to both.

His character in private life was as unsullied as was his public life.

While records of court endure, they will be a memorial to his industry, ability, integrity and sense of justice.

Our deepest sympathy is with his family and friends—their loss is our loss.

We move that this brief expression of our sincere regard be spread upon the records of this court.

CHARLES M. START,  
Chairman,  
JOHN G. WILLIAMS,  
LORIN CRAY,  
DAVID F. SIMPSON,  
ALEXANDER L. JAYNES,  
J. H. TOWN,  
CHESTER L. CALDWELL,  
Committee.

HON. CHARLES M. START then addressed the Court and said:

I desire briefly to express my appreciation of the work and worth of Mr. Justice Brown, and to add a word of personal tribute to his memory.

Our acquaintance began while he was judge of the Thirteenth Judicial District, and the longer I knew him the greater was my esteem and affection for him. For some years it was a part of my duties, in connection with my associates on this bench, to make a critical study of his rulings and decisions in the district court which were brought to this court for review. The Justices of the Supreme Court have a good opportunity, when studying appeal records, to determine the ability and character of a district judge. If he is able, fearless, fair and true, controlled by no motive except a sincere purpose to do justice without fear or favor, giving to all their legal rights as he understands them, the record will show it. If he be the reverse of this, a trimmer, shaping his rulings and decisions to win popular applause, or to avoid a reversal, the record will also show it. The truth is that, under our system of reporting trials in the district court, an appeal record is, to an appellate judge, a mirror unerringly reflecting the mental and moral characteristics of the trial judge. Minnesota has been and is exceptionally fortunate in the character of her district judges, and it would be invidious to say that Justice Brown was the ablest and best of them all. But my deliberate opinion, based upon the appeal records of this court and my personal knowledge, is that Minnesota has never had a better or fairer judge than Philip E. Brown. His opinions in this court show judicial ability of a high order, laborious and conscientious work, and a firm grasp of the pivotal facts and controlling principles of the case in hand. They also show that he was possessed of a keen sense of justice which no quibbling of counsel could obscure. His knowledge of constitutional law is shown in the opinion of the court, written by him, in the case of *State ex rel. v. City of Mankato*, 117 Minn. 458. The question in that case was the constitutionality of commission form of government. The opinion is a masterly one and entitles Justice Brown to rank with the great Justices of this court who have passed, not away, but on to a higher and better life. In his judicial work he was dominated by a sense of duty which would not permit him to spare himself although suffering from physical ills, for he was responsive to every call of duty and resolute in his devotion to right. He was an unassuming, heart-true, lovable

man, of positive convictions, great ability, pure character, and high ideals. He was a loyal and loving husband and father, a sincere friend, tender and true, and a brave chivalrous gentleman, worthy of Brutus' eulogy:

"His life was gentle; and the elements  
So mix'd in him that Nature might stand up  
And say to all the world: 'This was a man.' "

HON. J. L. WASHBURN then addressed the Court and said:

May it please the Court:

In the mighty conflict now pending in the very heart of the advanced civilization of the world, the intellect, the learning and the inventive genius of educated man are all brought into full activity to the end that the greatest number of men may be destroyed in the shortest time possible.

Brave men, good citizens, of the best blood of the warring nations have been destroyed by the million in a few months, and their places in the serried ranks of the combatants filled by others of the same character who carry forward the contest of battle and the work of carnage with equal courage and ferocity.

Men are scored only by numbers *en masse*, and they share in common and without identification the shallow burial trenches of the heroic dead.

The individual is ignored only as he is a part of a great fighting machine. Losses are counted by numbers and if only a few hundred or few thousand are slain it is given out that the losses were slight. Only the effectiveness and fortunes of aggregations receive interested attention from the recorders and readers of the conflicts upon hundreds of miles of battle lines.

Nevertheless the fact remains that the power, the value, the effectiveness and *morale* of the contending armies all depend upon the mettle of the individuals. The men who fight and die side by side in such conflicts have known the worth of one another.

It is our province in the peaceful struggle of life to know even more thoroughly one another individually, to measure one another's

worth, to bear an individual part in the upward striving for social development, and to mark with sorrow the calling of an individual comrade.

It may not be possible for surviving soldiers or commanders to pause in the conflict to give extended attention to the dead, and too often but little care to the wounded, but we may pause in our work, however strenuous it may be, to consider the life and character of those to whom the final summons has come, and to do deserved honor to their memory.

It is both fitting and beneficial that we should do so. It is fitting that a good citizen should be remembered and honored and it is beneficial to the living to recount the virtues of the noble dead.

When Philip E. Brown was touched by the wand of Death he was occupying a place in the first rank of distinguished citizens of this commonwealth.

He was endowed with a mind of power and discrimination. A liberal preparation, followed by his years of careful, conscientious application, gave him in his maturity superior strength as a lawyer and jurist.

Judge Brown was born in Lafayette County in Southern Wisconsin, June 19, 1856. He was educated at the University of Wisconsin, and graduated from the Albany, New York, Law School. He began the practice of law at Darlington, the county seat of his native county, but after two years settled in Luverne, Minnesota, where he practised from 1882 to 1891, and where he continued to reside until his death. In 1891 he became judge of the Thirteenth Judicial District of this state and continued in that position until the close of 1910, having that year been elected to the bench of this Court of which he was an honored and most efficient member until his death.

It is to be noticed that Judge Brown's career has run along a definite line. He was not diverted from giving his undivided efforts to the pursuit of the law as a practitioner and as a jurist. There was that confidence in the accuracy of his judgment and justice of his conclusions that only such a course and such habits can inspire.

I met him first in the early eighties. I think he had not long

been at Luverne. I had heard of him, for that he was a lawyer who knew how to work and who was an adversary to be feared soon became known.

We first met at an encampment of the old Second Regiment of the Minnesota National Guard, and I deem it an honor to myself to say that I believe we always thereafter felt that we were friends, although after my removal to Duluth we lived in extreme opposite parts in the State, and did not often meet. I was glad to see him elevated to this bench, for he was fit.

My brethren of the Northern part of the State and especially the members of the Bar Association of the Eleventh Judicial District, whose guest he was on several occasions, acquired a great fondness for him and a high appreciation of his judicial abilities and his personal character.

It is, as their representative, that I assume to occupy any time or place in these memorial exercises.

At the risk of repetition of what others may say, I recount that a discriminating sense of justice; a keen judgment of the law; modesty of assertion; unlimited courage; a genial and generous disposition and chivalrous spirit; a high sense of personal honor and an elevated standard of duty as a citizen, all crowned with habits of industry and sobriety, were the dominant characteristics and virtues of this distinguished citizen.

The tug at the sleeve that such a life makes tends to stimulate his companions who still abide to emulate his virtues and when the summons comes to them, to courageously cross the threshold into the unknown, but let us hope not unknowable, sequence of human life and human effort.

HON. ROYAL A. STONE then addressed the Court and said:

May it please the Court:

The inadequacy of words on this occasion is as painful as it is obvious. Our hearts are full, but because the content is grief for a departed friend, brother, leader, we cannot lighten the burden.

But that is not our purpose here. We are met at the bar of this Court to bear witness as to the life and character, and more especially the judicial life and character, of one who was an Associate of your Honors upon this Bench.

For many years prior to his coming to this Court, he was a judge of the Thirteenth Judicial District. As district judge and as Associate Justice of this Court, he made for himself an enviable reputation. He became unusually well known, personally, to the Bar of Minnesota.

His place among us has been vacated by Death, and, as is always the case, we are thereby, for the first time, brought to an adequate appreciation of his great merits as a man, his true value as a citizen, and his splendid service as a judge.

"We are to say what we take the law to be. If we do not speak our real opinion, we prevaricate with God and our own consciences."

These words of Lord Mansfield furnish a most fitting text for any dissertation on the life of Philip E. Brown, and especially his work as a jurist, as an expounder of the law.

"We are to say what we take the law to be."

How simple, how direct, how courageous a statement is that of the duty of a judge!

And how simply, how directly, how courageously did Philip E. Brown perform that duty.

"To say what we take the law to be,"—and to that task Judge Brown applied a persevering diligence, a profound learning, a ripe experience and a balanced judgment.

"If we do not speak our real opinion, we prevaricate with God and our own consciences."

There we have, in the language of a judge of a bygone century, the *motif* of the judicial work, aye, of the very life of him, in tender memory, in loving respect for whom we are now gathered at the bar of the Court from which so recently the hand of Death has snatched him.

The fearless and confident expression of his "*real opinion*" was Judge Brown's most outstanding trait.

Careful in judgment, seeking all proper aids, applying carefully

the most rigid tests, he had an unusually accurate process of reasoning.

Not opinionated, he yet had that confidence in his own conclusions which such mental processes ought to beget in their fortunate possessor.

The frankness and confidence with which he expressed his deliberate judgment was equalled only by the open-mindedness with which he listened to and weighed the contrary view and the readiness with which he would detect, acknowledge and remedy his own error, if any.

And when finally his conclusion was reached—his “real opinion”—it was expressed without fear; expressed confidently because without fear of “prevarication with God,” or “his own conscience.”

What a horror he had of such prevarication—of intellectual dishonesty!

If all that can be said of a deceased lawyer, especially if he be a judge, is that he was morally honest, better far that his brethren do not attempt to memorialize such relatively scant virtue.

But if, in addition to moral rectitude, there is an uncompromising, upstanding and outstanding intellectual cleanness and honesty, then we have a man indeed.

Judge Brown was as much an exemplar of intellectual as of moral honesty.

Quibbles, indirections, uncertainties, evasions, were all abhorrent to him, whether they pertained to considerations of ethics or of logic.

Justice was ever his goal; to be right his constant aim.

These are days of progressivism. So have been all days since creation. So will be all days to the end of time. It must be so or the philosophy of civilization and the tenets of Christianity are alike untenable.

Human conduct is ruled by law. Therefore, as humanity is constantly progressive, so must law be constantly progressive. Static or retrograde law cannot achieve justice.

How accurate, how broad, how human, was Judge Brown's conception of this truth.

If ever there was a sanely progressive expounder of the law, it

was Judge Brown. With wonderful clarity of vision he discriminated between precedents. He properly and courageously discarded those, and only those, that had been rendered *passé* because the changes wrought by time had deprived them of all propriety, if not of all possibility, of application to modern conditions.

Appreciating to the full the undying and unchanging attributes of truth, of justice in the abstract, he yet realized that justice in the "myriad of single instances," the controversies that arise between man and man, must be found and expressed, not in the records and rules of a dead past, but in the ideals and terms of contemporaneous humanity.

As district judge, as Associate Judge of this Court, his life was preeminently one of service, to his community and the state.

His "community," the Thirteenth Judicial District, there, where he had his home, where his "daily walk and conversation" were known of all, is the place to find the best record of Judge Brown's great qualities of mind and heart and soul. It is in the high opinion, the great and affectionate regard of lawyer and layman, of those who have known him longest and best.

Some years ago, it was my good fortune to attend a banquet tendered to Judge Brown at Windom, (or was it Worthington), by the Bar of the Thirteenth District. The occasion was Judge Brown's return to active service after a considerable absence, which had been enforced by his ill-health. Never has there been a more genuine expression of good will, of confidence, of admiration; aye, of affection, for a public man.

Our modern citizenry is ready enough to proclaim its admiration for a political servant for the time being in its good favor. It is very slow to give expression to any appreciation of the work of a judge, however long continued and distinguished his services may have been.

But on that occasion the Bar of the Thirteenth District broke down the usual reserve and spoke what was in their minds, as to their regard for Judge Brown. So sincere, so affectionate was their greeting, so genuine their pleasure at having him back on the Bench and in his accustomed place, that it seemed to be a large family

festival held to celebrate the return, after a long absence, of the *paterfamilias*.

It was an occasion unique in the experience of the judiciary of this State, and showed, in an unusually convincing manner, the high regard in which Judge Brown was held by his professional "home folks," and their opinion in such matters is always the best.

The illness which at that time had temporarily removed him from his judicial labors, never entirely left him. He was urged to retire; but, even though he might have saved himself by leaving the Bench, he refused to do so.

He kept on, and finally his life was a forfeit to his work, a sacrifice on the altar of his duty as a citizen and a judge of this great Commonwealth.

His loyalty to his ideals of judicial duty kept him at his labors long after physical affliction justified, and his own circumstances permitted, his retirement. The ills of the flesh availed not against his courageous soul. But they finally overwhelmed his body, and struck him down at the post from whence they could not drive him.

Thus ended a mortal career in which there was realized a very high ideal of service.

Truly this life was a living "epistle \* \* \* known and read of all men." In his life, but still more in his untimely death, there is that which should inspire all, especially the members of his profession, to that life of unselfish service, by which only its highest purposes can be achieved, its greatest privileges enjoyed, and its richest awards attained.

HON. ALEXANDER L. JAYNES then addressed the Court and said:

It is with a strong sense of my own inability, but with a feeling of obligation that I rise here to add a few words to what has already been said about Justice Brown.

I knew Judge Brown probably as well as any man. To me he was not only a friend, but almost a father, and all that word means with its kindly love and sympathy. When I was a boy he played

with me; in my college days he did much to direct my course and inspire my energy. Later in the practice of law in his court in a kindly manner he corrected my errors and endeavored to inspire in me a sense of the nobility and dignity of our profession. I say this, for mine was the common experience of all young men who began the practice of law before him. He inspired all of us to do the things that were right. We knew that his mind quickly detected the false and arrived unerringly at the truth. To him we always went for advice, whatever our difficulties—love, law or politics. It was as freely given as it was freely sought. He knew and understood young men. He loved young men. He was always young. Our ambitious dreams he could make his own—our faults overlook—our virtues encourage. He conferred upon us all the same consideration and interest that he would have given to a son. All of us who grew up in the Thirteenth Judicial District loved him and he loved us; nothing more can we say. Why then at this moment when for the last time we give public expression to our common loss should our hearts be sad, but rather, in the language of one of England's great poets, we say:

“Enough of sorrow, wreck and blight;  
Think rather of those moments bright;  
When to the consciousness of right his course was true;  
When wisdom prospered in his sight and virtue grew.”

HARRISON L. SCHMITT, Esq., President of the Minnesota State Bar Association, then addressed the Court and said:

May it please the Court:

We are here today to commemorate and perpetuate upon the permanent records of this court, the name and fame of a brother lawyer who was at the time of his death an honored member of this the highest court in the state and who, through his uniform kindness, his great ability and sterling honesty, had become very dear to us all.

I cannot add to what has already been said by members of the Bar of Minnesota in honor of Justice Brown. I want to endorse

every word from the bottom of my heart. No human mind can frame or human voice express any sentiment that Justice Brown did not deserve. However, in behalf of the Minnesota State Bar Association, of which Justice Brown was a valued and active member, I feel it my duty to call the attention of the members of our Association and members of the Bar of Minnesota in general to a few things.

For years every lawyer here present, in fact every lawyer in the state, having knowledge of the enormous amount of work members of this court have been compelled to do in order that unjust delays in the meting-out of justice might be avoided, has known that no human being could continue to do that work for any considerable length of time without ruining his health, and paving the way to an early grave.

For years, and notably during the 1914 campaign, this association endeavored to bring home to the voters of the state, knowledge of the fact that our Supreme Court Judges were being shamefully overworked and that it was imperative to increase the membership of the Court, to secure relief.

But as usual, the voters of the state, on account of lack of knowledge of the facts and general indifference, said "No, the Court is keeping up the work, why add to the expense of the taxpayers by increasing the number of judges?" Members of the Bar generally have not done their duty as citizens, in that they have not used diligence in informing their friends upon this important matter.

The result is that Justice Brown is but another victim who has been sacrificed upon the altar of public duty, and we lawyers must bear the stigma of having contributed to this our irreparable loss. Justice Brown was always under all circumstances, while holding public office, a public servant in the truest sense. So deep rooted was his sense of public duty, that rather than permit the work of the Court to fall behind, he labored beyond all human endurance.

We have been and are requiring our Supreme Court Justices and Commissioners to hear three appeals a day, five days every week, almost the year round, in order that the lawyers and litigants of this state, and of many other states, might not be denied speedy

justice. Justice Brown assumed this burden cheerfully and went to his grave with a smile on his face, and nothing but love in his heart for his fellows.

In view of all this, is it not our solemn duty to see to it that these conditions are speedily changed? We can and must do it. We must do our utmost in this regard if we would purge ourselves of blame for future conditions. Justice Brown does not need our praise. His name and fame will continue to shine as a beacon light showing us and our followers the way to glory and success. If his untimely death shall wake us up and shall show us our responsibility to such an extent that there will be no cause for blaming ourselves in the future for such conditions, we may at least feel that our sins of the past have been condoned.

Let us therefore take the lesson home to our hearts and remembering that our departed brother labored unceasingly in the public service, and thereby crowned his career with everlasting pillars of honor, try to profit by his example.

ASSOCIATE JUSTICE BUNN responded on behalf of the Court:

Gentlemen of the Bar:

You do well to commemorate the life and services of Philip E. Brown. Minnesota has before mourned great judges but I doubt very much if she ever had greater cause. The elements were so mixed in him that it is no disparagement of either living or dead to say that Philip E. Brown was one of the greatest judges that Minnesota ever had. He was a man with a passion to be right and a wonderful capacity for seeing the right. He possessed a keen and sane wholesome mind, thoroughly equipped. He was a tremendous and tireless worker. He met every question squarely. He never dodged. He was no temporizer or compromiser. Himself a man of broad and human views, he had little sympathy with technicality and none at all with anything that approached dishonesty. No case was ever presented to this court that failed to receive the most painstaking scrutiny on his part, and it mattered not how small the amount

involved was. He never wrote an opinion without exhausting the law on the subject in his researches. He was absolutely fearless. Never courted popularity with the people or with the Bar. Never thinking for one moment of the possible effect on his own future of an unpopular decision he nevertheless stood exceedingly high in public esteem. I feel the personal loss deeply. We were very close to each other during the last few years. He was a loyal friend, a lovable companion and a big-hearted man.

CHIEF JUSTICE BROWN also responded on behalf of the Court and said:

The memorial presented is a fitting tribute to the character and worth of a just and upright judge. It may be truthfully said that no member of any court ever entered upon his judicial duties with a firmer or more determined purpose faithfully to discharge every duty imposed upon him, even to minute details, than the late Justice Philip E. Brown; no member of any court ever devoted himself more laboriously and earnestly in the examination of every cause presented for decision, and the labor and research disclosed by the opinions written by him furnish an illustration of the time and attention given to other causes. He neglected no duty, was faithful to every trust and pre-eminently qualified for judicial work. He was not in robust health during his term of service, yet he labored continuously from early morn until late at night, striving to master the records and briefs before the Court, and uniformly come to a clear understanding of every cause presented. By his constant application he obstructed the healing qualities of nature and undermined his strength, gradually weakening his vital forces until the end of life's journey came without warning. He was a martyr to his fidelity.

Your memorial will be entered in the records of the court, there to remain in perpetual remembrance of a member of this court of whom it may well be said, "Well done, thou good and faithful servant."

And as a further tribute to his memory it is ordered that the court do now stand adjourned.



BY ORDERS MADE IN OPEN COURT, THE OPINIONS  
WRITTEN BY THE COMMISSIONERS AND REPORT-  
ED IN THIS VOLUME WERE ADOPTED AS THE  
OPINIONS OF THE COURT BEFORE THEY WERE  
FILED, AND HAVE THE SAME FORCE AND EFFECT  
AS THOUGH WRITTEN BY A JUSTICE OF THE  
COURT.

FOR TABLE OF STATUTES CITED BY THE COURT,  
SEE INDEX, PAGES 619-623.

xxxvi

123 M.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF MINNESOTA.

---

MARKUS JOHNSON v. MINNESOTA FARMERS MUTUAL  
INSURANCE COMPANY.<sup>1</sup>

December 18, 1914.

Nos. 18,880—(117.)

**Insurance.**

In an action upon a hail-insurance policy, the record is examined and *held* to present no reversible error.

Action in the district court for Swift county to recover \$345 upon defendant's policy insuring plaintiff's crops from hail storms. The case was tried before Qvale, J., who directed a verdict in favor of plaintiff and a jury which fixed the amount at \$251.12. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

*William N. M. Crawford*, for appellant.

*E. L. Thornton*, for respondent.

BROWN, C. J.

Defendant, a mutual Farmers Insurance Co., issued to plaintiff a policy insuring plaintiff's grain against injury or damage from hail.

<sup>1</sup> Reported in 150 N. W. 174.

The crops so insured were damaged by a hail storm, and this action was brought to recover the loss. Plaintiff had a verdict, upon which judgment was rendered, and defendant appealed.

The defense to the action was that the loss suffered by plaintiff had been adjusted and that defendant agreed to pay therefor and plaintiff agreed to accept in full settlement the sum of \$50, or such lesser amount as defendant's executive board might determine was plaintiff's share of the year's assessment. The settlement was in writing signed by both parties, and on its face sustains the defense. Plaintiff replied that the alleged settlement was never entered into by him and that the document evidencing the same was procured by fraud and fraudulent representations. Whether this settlement was procured by fraud was the principal issue on the trial. The jury found for plaintiff and, under the instructions of the court, necessarily that no contract of settlement was ever entered into by the parties; and that the writing was procured by fraud.

It is contended, under the various assignments of error: (1) That the evidence does not support the verdict; (2) that the court erred in its rulings on the admission and exclusion of evidence, and (3) that there was prejudicial error in the charge of the court.

These contentions do not require extended discussion. We have examined the record carefully and discover no reason for disturbing the verdict. The evidence is amply sufficient to support the conclusion that the adjustment of the loss was procured by fraud, and there were no errors of a character to justify a new trial in the rulings of the court upon the admission or exclusion of evidence. It would serve no useful purpose to discuss the evidence or the rulings referred to, and we refrain. It is sufficient that we have fully examined the record with the result stated. Nor did the court err to the prejudice of defendant in its instructions. Defendant, as already stated, insisted in defense to the action that the loss had been adjusted at the sum of \$50. The court charged the jury that plaintiff was entitled to recover at least that amount, and such further amount as the evidence justified if they found that the settlement was fraudulently obtained. The charge was clearly right. The court also instructed the jury that if the settlement was fraudu-

lent, and they so found, that plaintiff was entitled to recover what would fairly cover his loss. The court might well have added to this a reference to the terms of the policy, to the end that the jury would definitely be informed that the amounts stipulated in the policy could not be exceeded. The crops insured consisted of 35 acres of wheat and 35 acres of barley, and, as we understand from defendant's brief (the policy is not a part of the record in this court), were insured at the rate of \$10 per acre for a total, \$5 for a one-half, and \$2.50 for one-fourth loss, as to one of the crops, and the same relative ratio for the other crop, with \$7 per acre as the maximum. Defendant presented no requests for instructions upon this feature of the case, though exception was taken to the failure to instruct that plaintiff's loss was to be determined on a percentage basis. The failure of the court to go more fully into this subject, if error at all, was clearly without prejudice. There was evidence that each crop was injured and damaged to the extent of one-half, and the verdict rendered is well within the limits fixed by the contract, even from defendant's percentage viewpoint. The verdict was for \$251.12. The assignments covering this feature of the case present no reason for a reversal. There was no competent evidence of an assessment by the company against defendant, and the counterclaim or defense based thereon was properly excluded from consideration, as well as the evidence complained of by assignment of error number two.

Judgment affirmed.

---

SIGNA STREAM WINTERS and Others v. ANDREW D.  
ELLEFSON.<sup>1</sup>

December 18, 1914.

Nos. 18,881—(125).

**Negligence of administrator — complaint.**

A complaint in an action by heirs against the administrator of their in-

<sup>1</sup> Reported in 150 N. W. 170.

testate's estate, to recover the value of lands alleged to have been lost through defendant's failure to pay taxes or to redeem from tax sale, is demurrable where it contains no allegations of negligence and shows an unassailed discharge of defendant by a probate court having jurisdiction in the premises.

Action in the district court for St. Louis county upon two causes of action to recover \$775.05. From an order, Dancer, J., sustaining defendant's demurrer to plaintiffs' amended complaint, plaintiffs appealed. Affirmed.

*Washburn, Bailey & Mitchell*, for appellants.

*W. G. Bonham*, for respondent.

PHILIP E. BROWN, J.

The court below sustained a demurrer interposed to the complaint on the grounds of lack of jurisdiction and no cause of action stated. Plaintiff appealed.

According to the complaint, plaintiffs were the sole heirs at law of John Stream, who died intestate in 1905 owning several described tracts of land in St. Louis county. Defendant was appointed administrator of his estate by its probate court, and continued to act as such "until discharged by the said probate court" in 1911. Some of these lands were sold for taxes before defendant's appointment, and one tract became delinquent thereafter through his failure to pay taxes thereon. He did not redeem, and the property, of stated value, was thereby lost to plaintiffs, for which a recovery is sought.

The ruling was correct. The title to the lands vested in the heirs of decedent immediately upon his death; but our statutes gave defendant, as administrator, the right to possession for purposes of administration, as against the heirs, until settlement of the estate. Hence the duty to pay taxes devolved upon him, provided he had assets available therefor, or was in some way chargeable with having them, and provided further that ordinary prudence required such payment in order to conserve the interests of the estate. *Thompson v. Thompson*, 77 Ga. 692, 699, 3 S. E. 261; *Cummings v. Bradley*, 57 Ala. 224, 239; 2 Woerner, Adm. § 518. In any event, therefore,

the gist of the action is negligence, and the complaint contains no allegations thereof.

Moreover, the discharge of the administrator shown by the complaint must be deemed as made under G. S. 1913, § 7400, which, in effect, authorizes a discharge by the probate court when the administrator has in all things well, faithfully and fully administered his trust; and the decree, being one of a court having jurisdiction and standing unassailed, completely protects defendant as against the claim here made. *State v. Probate Court of Hennepin County*, 112 Minn. 279, 287, 128 N. W. 18; *Brown v. Strom*, 113 Minn. 1, 5, 129 N. W. 136.

Order affirmed.

---

## KENNY & ANKER v. DULUTH LOG COMPANY.

### D. MEALEY v. DULUTH LOG COMPANY.<sup>1</sup>

December 18, 1914.

Nos. 18,884, 18,885—(127, 128).

#### **Log lien — findings defective.**

1. Findings in actions to foreclose log liens *held* fatally defective as regards the contingencies prescribed by G. S. 1913 as conditions precedent to the right to file the lien statements, in that they showed neither demands for payment before the filings nor that the labor for which the liens were claimed was terminated by the employer's act or by completion of the work.

#### **Answer — issue of demand.**

2. Answers *held* sufficient to raise issues upon plaintiff's allegations of due demand.

#### **Log lien — time covered by lien statement.**

3. Where work for which a log lien is claimed was begun prior to October 1, and completed thereafter in the course of continuous employment, only that portion done between the date mentioned and April 1 thereafter is within the provision of R. L. 1905, § 3526 (G. S. 1913, § 7060), that where the

<sup>1</sup> Reported in 150 N. W. 216.

work is "wholly performed between October 1 and April 1 next thereafter" the statement may be filed on or before the last day of April.

**Work not lienable.**

4. A claim for hire of teams and their equipment in connection with logging work, *held*, under the findings, ruled by *McKinnon v. Red River Lumber Co.* 119 Minn. 479, and hence not lienable.

Two actions in the district court for St. Louis county to recover \$299.46 and \$668.74, respectively, for cutting, hauling and piling logs, and to foreclose liens for the same. The cases were tried before Feeler, J., who made findings and ordered judgment for plaintiff for \$291.86 in the first action and for \$286.33 in the second action. From the judgments entered pursuant to the orders for judgment, defendant appealed. Reversed.

*Baldwin, Baldwin & Holmes*, for appellant.

*Fryberger, Fulton & Spear*, for respondent.

**PHILIP E. BROWN, J.**

These are separate actions to foreclose log liens. Defendant Smith, for whom the services were rendered, defaulted. The court found that plaintiffs were entitled to judgment against him and adjudged the amount thereof a lien upon the logs of his codefendant corporation. The latter subsequently appealed from judgments entered pursuant to the findings. The cases come here on the pleadings, findings and judgments, and involve some like questions, which, for convenience, will be considered together; the ultimate inquiry in each being: Do the findings of fact sufficiently support the conclusion of law awarding the lien?

1. Defendant contends the findings are insufficient because, among other things, they fail to show either demand for payment before the filing of the lien statements, or that the labor for which the liens were claimed was terminated by the employer's act or else by completion of the work in which the employee was engaged. G. S. 1913, § 7059, provides:

"If the indebtedness so due be not paid within five days after demand therefor made upon the debtor in person, or upon some

agent or clerk of the debtor at his business office, the lienholder may file for record \* \* \* a statement," etc. "Provided, that if such labor or service be terminated by the direction or act of the employer, or by the completion of the work in which the employee is engaged, then no demand for payment shall be necessary, and the lien statement may be filed at once."

The preceding section gives a lien to one performing "manual labor or other personal service for hire, in or in aid of the cutting, hauling," etc., of logs, for the price or value of such labor or service.

There were no findings as to any demands, nor that the services were terminated by direction or act of the employer or by completion of the work. This omission we think fatal to the conclusions of law awarding the liens and likewise to the judgments, unless something can be found in the conduct of the litigation or in the findings sufficiently curative of the defect to take the cases out of the general rule requiring findings to cover all essential issues. The authorization for and basis of a judgment must exist in the findings. *Dunnell*, Minn. Pr. § 500; 3 *Dunnell*, Minn. Dig. § 9857. Wherefore, if the latter are insufficient in this respect the former is unsustainable. 3 *Dunnell*, Minn. Dig. § 9856. Plaintiffs claim, as taking the cases out of the rule, that issues were not joined on their allegations of due demands. In defendant log company's answers, however, it expressly denied any demand made upon it, and further averred lack of knowledge or information sufficient to form a belief as to any of the allegations of the complaints, except as admitted or qualified; which, no admission of demand on any person being made, sufficiently raised the issues. G. S. 1913, § 7756. Nor can plaintiffs' contention that an application should have been made to amend the findings so as to make them affirmatively show absence of demand be sustained. No such burden rested on defendant, and the objection interposed may be raised for the first time on appeal from the judgment. *Dunnell*, Minn. Pr. § 533; 3 *Dunnell*, Minn. Dig. § 9857. It necessarily follows, from what has been said, that the conclusions of law to the effect that plaintiffs were entitled to liens are not equivalent to findings of due demands.

These views dispose of the appeals adversely to plaintiffs' con-

tentions. What is further said concerns questions likely to arise on a retrial.

2. In the Kenny & Anker case the findings show that the labor for which a lien was allowed was performed between July 28, 1910, and March 28, 1911. The lien statement was filed April 29, 1911, which defendant claims was not within the time prescribed by R. L. 1905, § 3526 (G. S. 1913, § 7060), providing:

"The lien shall cease unless said statement be so filed within thirty days after the termination of such labor or service, unless the same shall have been *wholly performed* between October 1 and April 1 next thereafter, in which case the statement may be filed on or before the last day of said April."

Defendant contends that the words "wholly performed," which we have italicized, mean that the services must have been begun and finished within the dates specified, in order to comply with the statute; while plaintiffs claim they must be taken as equivalent to "wholly completed, wholly brought to a close, or wholly brought to a final completion" during such period.

The log-lien law of 1876, p. 100, c. 89, § 2 (see G. S. 1878, c. 32, § 64), contained the following:

"For all such labor done and performed between the first day of October and the first day of April, such statement shall be filed on or before the first day of May next thereafter, and for all labor done and performed between the first day of April and the first day of October, such statement shall be filed within thirty days after the completion or last day of such labor or services."

This act was repealed by Laws 1899, p. 433, c. 342, of which section 2, so far as here material, reads:

"For all such labor done and performed between the first day of October and the first day of April thereafter, such statement shall be filed on or before the first day of May next thereafter. And for all labor done and performed between the first day of April and the first day of October thereafter, such statement shall be filed within thirty days after the completion or last day of such labor or services. *Provided, however,* that when the labor and services for which such lien is claimed shall have been commenced before the

first day of April and shall continue without termination from the time of such commencement until after the first day of April, then, and in such case, the party performing such labor and services or his assignee shall have the right to file the statement herein provided for at any time within thirty days after the completion of such work."

This provision later passed into the Revision of 1905, as section 3526, in the form first above quoted, the latter being literally as drafted by the revision commission, who say in their report that the act of 1899, c. 342, "is preserved, substantially intact."

Under the general rule relating to construction of revisions of statutes, we think no intent appears to change the existing law by R. L. 1905. 3 Dunnell, Minn. Dig. and Supp. § 8961. The question, then, turns upon the meaning of the act of 1899; and its language is so plain and unambiguous that no room is left for construction; thus bringing it within the rule that a statute should be enforced literally as it reads if its language embodies a definite meaning involving neither contradiction nor absurdity. 3 Dunnell, Minn. Dig. § 8938. It simply divides the year into two periods, and the time for filing depends entirely on whether the labor was "done and performed" in the one or in the other, with the privilege, covered by the proviso, of a single filing within 30 days after completion for all work begun during the October to April season and continued over into the April to October period. And this is likewise the effect of the present law, which, by the simple process of revamping, including the qualification of the word "performed" by "wholly," merely condenses the old and dispenses with the necessity of the proviso.

As a practical matter, the point involved in the present case is of slight consequence so far as concerns the general operation of the law; for few cases will arise where the same conditions will not exist as in *Horgan v. Duluth Log Co.* 120 Minn. 244, 245, 139 N. W. 491, with reference to claims for work done prior to October 1 pursuant to employment continuing thereafter. In such instances, as in the *Horgan* case, claims for labor antedating October 1 will usually be liquidated by payments and credits, and doubtless the

legislature had this in mind when it failed to provide for an overlap of services from the summer to the winter season. Of course the statement in the present case was filed in time as to all work done after October 1.

3. In the Mealey case the lien was allowed for furnishing defendant Smith "certain teams, and equipment used with such teams, to be used and which actually were used in the performance" by him of his contract with the log company. These services as found, are within *McKinnon v. Red River Lumber Co.* 119 Minn. 479, 138 N. W. 781, 42 L.R.A.(N.S.) 872, and hence not lienable.

Judgments reversed.

---

## AUGUST VELIN v. LAUER BROTHERS.<sup>1</sup>

December 18, 1914.

Nos. 18,896—(148).

### Negligence — contributory negligence.

1. Evidence considered and *held* not to conclusively show that defendant was not negligent, or that plaintiff's intestate was guilty of contributory negligence or assumed the risk.

### Jurisdiction of district court after appeal taken.

2. An appeal from a nonappealable order and a *supersedeas* bond given thereon do not deprive the district court of jurisdiction to proceed further in the case.

Action in the district court for Ramsey county by the administrator of the estate of Andrew Marz, deceased, to recover \$7,500 for the death of his intestate. The case was tried before Brill, J., and a jury which returned a verdict in favor of plaintiff for \$2,000. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

<sup>1</sup> Reported in 150 N. W. 169.

*Trafford N. Jayne*, for appellant.

*Wondra & Helm* and *C. D. O'Brien*, for respondent.

BUNN, J.

This action was to recover damages sustained by the death of plaintiff's intestate, alleged to have been caused by the negligence of defendant. Plaintiff had a verdict for \$2,000. Defendant moved for judgment *non obstante*, which motion was denied. Judgment was entered upon the verdict and defendant appealed therefrom to this court.

The questions are the usual ones of negligence, contributory negligence, assumption of risk. This being an appeal from the judgment, with no motion for a new trial, we have only to inquire whether there was evidence which justified submitting the case to the jury. The rules which govern our consideration of the evidence under these circumstances are well understood. *Cruikshank v. St. Paul F. & M. Ins. Co.* 75 Minn. 266, 77 N. W. 958; *Bennett v. Great Northern Ry. Co.* 115 Minn. 128, 131 N. W. 1066.

There was evidence showing or tending to show the following facts:

On September 2, 1913, defendant was engaged in demolishing a two-story brick building situated on Minnesota street, between Sixth and Seventh streets, in St. Paul. Plaintiff's intestate during the forenoon of that day applied for work to the foreman in charge, and at one o'clock was put to work on the roof, helping remove brick which held the cornice in place. The cornice was of galvanized iron and extended along the front of the building; it was 46 feet long and two feet six inches high, the top extending a foot or so over the sidewalk. The bottom of the cornice set a foot into the wall, and was backed up with brick two feet and a half high. A 12-inch flashing was soldered to the cornice, carried over the top of the brick wall behind, and fastened under the brick. Four men, including Marz, plaintiff's intestate, were employed in removing the brick under the supervision of defendant's foreman, who instructed the men to dig a hole in the brick at each end and in

the center. Ropes were to be passed through these holes, brought up over the top of the cornice, tied around it and then carried back towards the rear of the building and fastened. This was to prevent the cornice from falling when the brick backing should be removed. The foreman himself in the presence of his men put the rope through the hole in the center, reached over the cornice with a pick, caught, pulled up and fastened the rope. An employee other than Marz performed the same operation at the south end of the cornice. The brick was all removed except at the north end, where Marz was engaged in removing it. Another employee dug the hole to get the rope through, but instead of passing the rope through the hole, threw the end over the cornice and planned to catch it with a wire through the hole. Marz was watching the operation, and told his fellow employee to pass the rope through the hole, and catch it by reaching over the cornice with his pick, as he had seen done at the center and the other end. The rope was then passed through the hole, Marz took the pick and reached over to catch the rope and tie it. The brick loosened with his weight, and the cornice bent down, causing Marz to lose his balance and fall to the street below. He was instantly killed.

The negligence relied upon consisted in the failure of defendant to warn plaintiff of the danger of the cornice falling. There is no doubt that no such warning was given. The contention is that the danger was obvious, and therefore that the warning was not required. But we do not think that this conclusively appears. Marz, though a man of mature years, was new on the job, and, as far as defendant knew, and in fact, was without experience at this kind of work. He should not be charged as a matter of law with knowledge that the cornice might bend or give way while he was doing the work as he had been instructed to do it. We hold that it was a question for the jury whether defendant, in failing to warn plaintiff's intestate of the danger, was guilty of a breach of its duty to a servant.

Contributory negligence does not conclusively appear. Marz had seen the foreman do the same thing with the rope at the center, and another employee do it at the south end. He had heard the fore-

man's instructions, and was justified in obeying them. The evidence does not show, as claimed by defendant, that Marz had not been told to do this work, or that he was a mere volunteer. The cornice was held in place by the ropes at the center and south end, and the brick was not yet removed from the north end. We cannot say that Marz was not justified in supposing that it would not give way when he reached over with the pick. Defendant's claim that the cornice did not bend down or give way, but that Marz slipped and so lost his balance, is not established by the evidence.

What has been said on the point of contributory negligence is equally pertinent on the question of the assumption of the risks. It does not conclusively appear that Marz knew or ought to have known the danger. The question was for the jury.

Applying the familiar rule of the Cruikshank case, we hold that the motion for judgment notwithstanding the verdict was properly denied.

Defendant appealed from the order denying the motion for judgment, giving a *supersedeas* bond which was approved by the trial judge. Plaintiff ignored this appeal, taxed costs, and had judgment entered on the verdict. Thereafter the appeal from the order was dismissed, and the present appeal from the judgment taken. Defendant claims that the judgment should be reversed because it was "prematurely" entered, while the appeal from the order was pending and the *supersedeas* bond in force. The order was plainly not appealable, and we do not think the attempted appeal and bond deprived the district court of jurisdiction. In any event we would not reverse this judgment simply for the purpose of having the same judgment entered again.

Plaintiff's contention that the settled case brought here on the appeal which was dismissed is not here on the present appeal is without merit.

Judgment affirmed.

**DAVID CARNEGIE v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>**

December 18, 1914.

Nos. 18,901—(133).

**Railroad crossing — negligence of passenger in automobile.**

The negligence of a driver of a vehicle is not imputed to a passenger riding therein; nevertheless the passenger is required to exercise reasonable care for his own safety. To charge him conclusively with contributory negligence, when about to cross a railroad track, in failing to see an approaching train, something more than ability to see the train and failure to look must be shown. In general a mere gratuitous passenger should not be found guilty of contributory negligence as a matter of law, unless he in some way actively participates in the negligence of the driver, or is aware that the driver is incompetent or careless or unmindful of some danger known to or apparent to the passenger, or is not taking proper precaution, and, being so aware, fails to warn or admonish the driver or to take proper steps to preserve his own safety. Contributory negligence in this case held a question of fact for the jury.

Action in the district court for Marshall county by the administrator of the estate of Clem William Carnegie, deceased, to recover \$7,500 for the death of his intestate. The case was tried before Grindeland, J., and a jury which returned a verdict in favor of plaintiff for \$2,500. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

*M. L. Countryman* and *A. L. Janes*, for appellant.

*Julius J. Olson*, *Charles Loring* and *G. A. Youngquist*, for respondent.

<sup>1</sup> Reported in 150 N. W. 164.

---

Note.—The question of imputing the negligence of a driver to a passenger is discussed in an extensive note in 8 L.R.A.(N.S.) 597.

HALLAM, J.

Clem Carnegie, a boy 17 years old, was instantly killed by collision with one of defendant's engines. He was at the time riding in an automobile driven by one Arthur Rost, a boy about the same age. It is conceded that there is sufficient proof that defendant was negligent in the operation of its engine. The only claim made on this appeal is that deceased was guilty of contributory negligence.

The accident happened at a prominent crossing in the village of Stephen, a place of about 700 inhabitants. Rost testified that, as he approached the track, and before he reached a little building called the "land office," about 120 feet from the track, he looked in the direction from which the engine was approaching, but did not see it. He admits that he neither looked nor listened after passing the land office. It is quite clear also that deceased did not look.

Rost, the driver of the car, was undoubtedly guilty of contributory negligence in approaching the tracks without looking or listening for a train. Whether deceased, a mere passenger, was negligent, is a different question. His conduct is measured by quite a different standard. We are of the opinion that, under the facts of this case, and the law as settled by previous decisions of this court, the question of the negligence of deceased was properly submitted to the jury. The engine came through town without stopping, at a speed admitted to be 25 miles an hour. The jury could well find that it was going much faster. They might also find that the bell was not rung. The engine was running on no schedule and the time was not near that of any regular train. Rost had just acquired this machine. It was an antiquated, one-cylinder runabout, a chain drive, noisy, slow moving, curious looking and emitting smoke. It attracted the attention of the boys of the town and they followed, annoying the driver by taking hold of the car, and interfering with the running gear some of which was exposed. The witnesses are not agreed as to how far the boys continued to follow the machine; one witness testified to seeing them about it after it passed a side track, which was within 60 feet of the main track upon which the collision occurred. The attention of the deceased was diverted in some measure by these boyish pranks, and his efforts were directed

in some measure toward keeping the boys away from the car. Rost was accustomed to drive an auto, was familiar with the tracks and the trains running thereon, and it nowhere appears that deceased in fact knew that Rost was not on the look-out. Rost was not the agent or servant of deceased. They were engaged in no joint enterprise. Deceased was simply taking a gratuitous ride in the automobile at the invitation of Rost, who was in no manner under his control.

Cases involving the principles here presented have been of frequent occurrence in this state. From among a larger number, we cite the following: *Howe v. Minneapolis, St. P. & S. S. M. Ry. Co.* 62 Minn. 71, 64 N. W. 102, 30 L.R.A. 684, 54 Am. St. 616; *Wosika v. St. Paul City Ry. Co.* 80 Minn. 364, 83 N. W. 386; *Lammers v. Great Northern Ry. Co.* 82 Minn. 120, 84 N. W. 728; *Teal v. St. Paul City Ry. Co.* 96 Minn. 379, 104 N. W. 945; *Liabraaten v. Minneapolis, St. P. & S. S. M. Ry. Co.* 105 Minn. 207, 117 N. W. 423, 15 Ann. Cas. 1147. See, also, *Pyle v. Clark*, 75 Fed. 644; *Pyle v. Clark*, 79 Fed. 744, 25 C. C. A. 190; *Wood v. Maine Cent. R. Co.* 101 Me. 469, 64 Atl. 833. The rule well established by these cases is in substance as follows: The negligence of the driver of a vehicle is not imputed to a mere passenger riding therein. Nevertheless a passenger is required to exercise a proper degree of care for his own safety, and any negligence on his part that contributes to his injury is fatal to his right to recover. He is obliged to exercise such care as a reasonably prudent person would, when riding with another under similar circumstances. A person of ordinary prudence riding with another, upon his invitation, will naturally put a certain trust in his judgment, and will rely in some measure on the assumption that he will use care to avoid the ordinary dangers of the road. In order to conclusively charge a mere passenger with contributory negligence in failing to see an approaching train, something more than ability to see and a failure to look must be shown. His failure to look is evidence to be considered on the question of his negligence, but it is not conclusive against him. In general, the primary duty of caring for the safety of the vehicle and its passengers rests upon the driver, and a mere gratuitous pas-

senger should not be found guilty of contributory negligence as a matter of law, unless he in some way actively participates in the negligence of the driver, or is aware either that the driver is incompetent or careless or unmindful of some danger known to or apparent to the passenger, or that the driver is not taking proper precautions in approaching a place of danger, and being so aware, fails to warn or admonish the driver, or to take proper steps to preserve his own safety.

Applying these principles to this case, it must be held that the court was right in submitting the question of contributory negligence to the jury, and the order appealed from is affirmed.

---

## MARY MADSON v. WILLIAM L. CHRISTENSON and Others.<sup>1</sup>

December 18, 1914.

Nos. 18,921—(120).

### Will — testimony of others than subscribing witness.

1. Where a will is contested, neither party is limited to the testimony of the subscribing witnesses, and either party may present other evidence to overcome the adverse testimony of such witnesses. The questions in controversy are to be determined from all the evidence bearing thereon, and not from the testimony of the subscribing witnesses only.

### Testimony of subscribing witness.

2. The statute requires that all subscribing witnesses, "who are within the state and are competent and able to testify, shall be produced and examined." Where the proponent called a subscribing witness and examined him as to the manner in which the will was executed, the failure to examine him as to the sanity of the testator will not defeat the will, if such sanity be proven by other evidence. By calling him as a witness his testimony was made available, and, if contestants desired his testimony upon matters omitted by proponent, it was incumbent upon them to examine him in respect thereto.

<sup>1</sup> Reported in 150 N. W. 213.

128 M.—2.

**Harmless error.**

3. It was error to permit a legatee under the will to testify to statements made by the testator at the time he executed the will, but the validity of the will was conclusively established outside such testimony and the error was without prejudice.

Mary Madson petitioned the probate court for Hennepin county for the allowance of the last will and testament of James P. Christenson, deceased. William L. Christenson, Anna Mogenson and Howard P. Christenson, a minor, filed objections to the allowance of the will. From the order of the probate court admitting the will to probate, the contestants appealed to the district court for that county. The appeal was tried before Jelley, J., and a jury which answered in the affirmative the questions whether the alleged will was signed and attested in accordance with the statutes of Minnesota, and whether James P. Christenson, at the time he signed the alleged will, was mentally capable of making a will; and answered in the negative the question whether the execution of the alleged will was procured by the undue influence of Mary Madson, exercised by her over the said James P. Christenson. From an order denying contestants' motion for a new trial, they appealed. Affirmed.

*Jay W. Crane*, for appellants.

*Grotte & Bowen*, for respondent.

TAYLOR, C.

This is a contest over the will of James P. Christenson, deceased. The probate court allowed the will and admitted it to probate. The contestants appealed to the district court. Issues were framed and submitted to a jury. The jury found that the will was duly executed; that the testator was competent to execute it; and that it was executed free from any undue influence. Contestants made a motion for a new trial, and appealed to this court from the order denying such motion.

The instrument purports, upon its face, to have been properly executed as the last will and testament of James P. Christenson. It bears his signature at the end thereof. The usual attestation clause

is attached, and is signed by Anthony T. Grotte and Frederick J. Miller as attesting witnesses. At the trial both these witnesses were produced. Mr. Grotte, the attorney who drew the will, testified to the effect that it was executed and attested, in all respects, as required by statute.

Mr. Miller testified that he signed the will as a witness at the request of Grotte and in the presence of Christenson, Grotte and Mrs. Madson, but that it was not signed by Christenson, nor formally acknowledged by him as his will, while he, Miller, was present.

Contestants insist that a contested will cannot be admitted to probate, if either subscribing witness testifies that the will was neither signed by the testator, nor formally acknowledged by him, in the presence of such witness. This contention cannot be sustained upon either principle or authority. Although the law requires that, in case of a contest, all available attesting witnesses shall be produced and examined, it does not clothe any witness with the absolute power to defeat the will by testifying that some prescribed formality was omitted. As said by the Michigan court in *Abbott v. Abbott*, 41 Mich. 540, 2 N. W. 810:

"We know of no rule of law which makes the probate of a will depend upon the recollection, or even the veracity of a subscribing witness. The law, for wise and obvious reasons, requires such instruments to be executed and attested with such precautions as will usually guard against fraud. But if the forgetfulness or falsehood of a subscribing witness can invalidate a will, it would be easy in many cases to use such artifices or corruption as would render the best will nugatory. Their evidence is not conclusive either way, nor does the law presume that they are either more or less truthful than others."

The question to be determined is whether the will was in fact executed in the manner prescribed by statute. This is a question of fact, and must be determined from all the evidence in the case, not from the testimony of the subscribing witnesses only. If the evidence, taken as a whole, establishes, satisfactorily, that the will was properly executed, its validity should be upheld, even against the testimony of one, or both, of the subscribing witnesses. Matter of

Will of Cottrell, 95 N. Y. 329; In re Jones Will, 85 N. Y. Supp. 294; Hopf v. State, 72 Tex. 281, 10 S. W. 589; Will of Susan Jenkins, 43 Wis. 610; Gillis v. Gillis, 96 Ga. 1, 23 S. E. 107, 30 L.R.A. 143, 51 Am. St. 121; Beggan's Case, 68 N. J. Eq. 572, 59 Atl. 874; McCurdy v. Neall, 42 N. J. Eq. 333, 7 Atl. 566; Mead v. Trustees of Presbyterian Church, 229 Ill. 526, 83 N. E. 371, 14 L.R.A.(N.S.) 255, 11 Ann. Cas. 426; Barnewall v. Murrell, 108 Ala. 366, 18 South. 831; In re Shapter's Estate, 35 Colo. 578, 85 Pac. 688, 6 L.R.A.(N.S.) 575, and note, 117 Am. St. 216; Bell v. Clark, 31 N. C. 239.

2. The evidence is ample to show that Mr. Christenson was competent to make a will at the time the instrument in controversy was executed, and there is no evidence to the contrary. Mr. Miller was not interrogated upon this point, however, and contestants insist that the will cannot be established without his testimony upon that question. We cannot assent to this proposition. Contestants rely upon the statute which provides that all attesting witnesses, "who are within the state, and are competent and able to testify, shall be produced and examined." We cannot hold that the legislature intended, by this statute, to defeat a will, whenever the proponent should neglect to interrogate a subscribing witness as to some of the facts necessary to establish its validity. Such a rule would operate to place a premium upon technicalities. The attesting witnesses are not necessarily the witnesses of the proponent in the sense in which that expression is usually understood. They are witnesses provided for by law, and the court is entitled to such information as they can impart. The proponent is required to call them, although he may know that they will testify against him. The statute requires that they shall be produced and examined, but does not prescribe the nature or extent of such examination, nor that they shall be interrogated by the proponent as to all matters bearing upon the validity of the will. When they are called to the stand as witnesses, their testimony is thereby made available. The examination conducted by the proponent may be supplemented by such further examination, by others, as may be necessary to elicit all the facts

within their knowledge. Where such a witness is called and examined by the proponent and, upon such examination, discloses that he is a subscribing witness, and testifies as to the manner in which the will was executed, the failure of the proponent to examine him as to the sanity of the testator will not bar the will from admission to probate, if there be sufficient other evidence to show that the testator was, in fact, competent to execute. If contestants desire his testimony as to matters concerning which the proponent has not examined him, they should inquire as to such matters themselves. If they omit to do so, the failure of the witness to testify in respect to such matters cannot be permitted to defeat the will. His failure to testify as to the testamentary capacity of the testator, ought not to bar the probate of the will, if his positive testimony that the testator did not possess such capacity would not have that effect; and the authorities hold that the validity of the will may be established notwithstanding such positive testimony. *Masonic Orphans' Home v. Gracy*, 190 Ill. 95, 60 N. E. 194; *Martin v. Perkins*, 56 Miss. 204; *Perkins v. Perkins*, 39 N. H. 163; *Will of Susan Jenkins*, 43 Wis. 610; *Wigmore, Evidence*, §§ 1302, 2049; also the cases previously cited.

3. Mrs. Madson, the proponent of the will and one of the legatees thereunder, was present when it was executed, and was called as a witness. Her testimony that the will was signed by the testator in the presence of both attesting witnesses was unquestionably competent; but, as she would receive a direct pecuniary benefit from the establishment of the will and its admission to probate, she was disqualified by the statute from testifying as to "any conversation with, or admission of," the deceased. Section 8378, G. S. 1913. The statute disqualifies her from testifying as to "conversations with or admissions of" the deceased even if she took no part therein herself. *Comstock v. Comstock*, 76 Minn. 396, 79 N. W. 300.

After she had stated that those present at the execution of the will were Mr. Christenson, Mr. Grotte, Mr. Miller and herself, she was asked by Mr. Grotte, who was conducting the examination, to state "what conversation was had between all the parties concerned

there as far as you can remember." Thereupon counsel for contestants stated:

"I object to any conversation at this time; it appears this lady is interested in this matter and Mr. James Christenson is dead. I object to any conversation between this lady and Mr. Christenson and to what occurred."

The objection was overruled and an exception taken. The witness then inquired: "Well, at the time when the will was signed, do you mean?" to which Mr. Grotte responded, "during that time tell what occurred." Counsel for contestants then interposed: "Same objection—the party appears to be dead and this lady is an interested party." This objection was also overruled and an exception taken. The witness then answered:

"Well, Mr. Miller was called into your private office at that time and when he came in there you introduced him to Mr. Christenson and you then said that this man has just made his will and he wants us to act as witnesses, and you turned to Mr. Christenson and says 'Is this your last will and testament?' something to that effect, and he says 'Yes.' Well, then, you said to him, 'Do you want us to sign this as witnesses?' and he says 'Yes, that will be all right.'"

It is not contended that this testimony was admissible; but the effect of the statute is sought to be avoided on the ground that the objection was not sufficiently specific; that the question as finally submitted to the witness did not call for such statements; and that no motion was made to strike out the improper testimony. The original question called for the entire conversation between all the parties present at the execution of the will; the objection to it had been overruled; and it is apparent that neither the court, the parties, nor the witness, understood the response to the inquiry of the witness as indicating that she was not to give such conversation. She merely asked whether the question referred to the time when the will was signed, and was directed to tell what occurred during that time. The making of these statements was a part of what "occurred," according to the witness. The question was improper, because it called upon the witness to state the conversation of the

deceased, as well as the conversation of the others. The objection interposed was not carefully framed, and was not limited to the objectionable element in the question, but it pointed out clearly that it was based upon the fact that the testator was dead and that the witness was an interested party. The point in the objection was obvious, and must have been fully understood, and no one could have been misled. Under such circumstances, we are not willing to say that the objection can be disregarded because not specifically limited to the objectionable element in the question. To disregard it upon that ground would be to invoke a bare technicality to sustain the admission of evidence declared by the statute to be inadmissible. The rule that a motion must be made to strike out improper evidence, in order to raise the question of its admissibility on appeal, does not apply where proper objection to its introduction was made before it was received.

4. Mr. Christenson was a business man in the full possession of his faculties. It is undisputed that he employed Mr. Grotte to prepare his will; that, at the time in question, he went to Mr. Grotte's office for the purpose of executing it; that his signature thereto is genuine; that the attestation clause is in proper form and was signed in his presence by both Mr. Grotte and Mr. Miller as attesting witnesses; that he saw, heard and understood all that took place, and that he took possession of the will and carried it away with him. The objections to the probate of the will are purely technical. The only evidence, tending in anywise to impugn it, is the statement of the witness, Miller, that it was not signed by Mr. Christenson nor formally acknowledged by him while the witness was present. Miller's version of the transaction is: That, when he entered the room, the will was lying upon the desk with Christenson's name already written in the place for the signature; that Grotte introduced him to Christenson with the statement that Christenson had made his last will and wanted them to sign as witnesses; that Christenson expressed pleasure at meeting him, but gave no express assent to the statement made by Grotte; that thereupon, in the presence of Christenson, both he and Grotte signed the attestation clause as witnesses, and that Grotte then folded up the will,

placed it in an envelope and handed it to Christenson who took it and inquired as to Grotte's fees as the witness left the room.

It is held by several courts that a request to sign as witnesses, made by one intrusted with the preparation of a will, in the presence of the testator and under such circumstances as are above related, is to be taken as the request of the testator. *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650, and cases cited therein. *Will of John Meurer*, 44 Wis. 392, 28 Am. Rep. 591; *Bundy v. McKnight*, 48 Ind. 502; *Welch v. Adams*, 63 N. H. 344, 1 Atl. 1, 56 Am. Rep. 521. In *Harp v. Parr*, 168 Ill. 459, 474, 48 N. E. 113, 117, it is said at the bottom of page 474 "the person who drew the will, and who superintended its execution, spoke of it as the testator's will in the testator's presence, and requested the witnesses in the testator's presence, to sign it as his will. The silence and presence of the testator gave consent to these declarations on the part of the person superintending the execution of the will, and amounted to an acknowledgment by the testator of the will as his act and deed."

Mr. Grotte and Mrs. Madson were present during the entire transaction, and both testify positively that the will was signed by Mr. Christenson after Miller came into the room and in his presence. Mrs. Madson's testimony was competent as to such fact. There is nothing to impeach the will except the statement of Miller as to the manner in which it was executed, and the court are of opinion that its validity was conclusively established, outside the testimony erroneously admitted, and that the case falls within the rule that a reversal will not be ordered for the erroneous admission of evidence, where it is clear that the result would have been the same had such evidence been rejected. *Crowley v. Burns Boiler & Mnfg. Co.* 100 Minn. 178, 110 N. W. 969; *State v. Crawford*, 96 Minn. 95, 104 N. W. 768, 822, 1 L.R.A.(N.S.) 839; *Whitaker v. Chicago, St. P. M. & O. Ry. Co.* 115 Minn. 140, 131 N. W. 1061; *Bahr v. Northern Pac. Ry. Co.* 101 Minn. 314, 112 N. W. 267; *Aske v. Duluth & Iron Range R. Co.* 83 Minn. 197, 85 N. W. 1011; 1 Wigmore, Evidence, § 21.

Order affirmed.

STATE ex rel. LYNDON A. SMITH v. CHICAGO,  
MILWAUKEE & ST. PAUL RAILWAY COMPANY.<sup>1</sup>

December 18, 1914.

Nos. 18,962—(18).

**Maximum passenger rates — construction of statute.**

Laws 1913, chapter 536, provides that no railroad company shall charge for transporting any passenger any sum in excess of the following prices, viz: For a distance not exceeding five miles, three cents per mile; for all other distances, two cents per mile. Construing this act it is *held*:

(1) The language of the act is ambiguous. It is uncertain whether the legislature intended to authorize a railroad company, when the distance exceeds five miles, to charge three cents per mile for the first five miles and two cents per mile for the additional distance, or only to charge two cents per mile for the entire distance. The act is therefore open to construction.

(2) Considering the probable object of the legislature in granting the three cent rate, the absurd results of the last named construction, the fact that such construction would necessitate holding that prior inconsistent statutes had been repealed by implication, or that putting in effect the rate permitted would necessarily involve violations of such prior statutes, the act is construed to mean that a railroad company is permitted to charge three cents per mile for the first five miles of a passenger's trip, and two cents per mile for the additional distance.

(3) There has been no practical construction of the act that should influence our construction thereof.

Upon the relation of Lyndon A. Smith, Attorney General, the district court for Ramsey county granted its alternative writ of mandamus requiring respondent to promulgate, put in force and act upon a schedule of passenger rates conforming to chapter 536, Laws 1913, and prescribing therein for all distances other than and in excess of five miles a rate of two cents per mile for the transportation of passengers and their ordinary baggage not exceeding 150 pounds, and to charge therefor a rate not in excess of the rate

<sup>1</sup> Reported in 150 N. W. 172.

of two cents per mile for other distances than and in excess of five miles. The matter was heard before Olin B. Lewis, J., who denied respondent's motion to quash the writ and overruled its demurrer to the petition and writ and certified that the question presented by the demurrer was important and doubtful. From the order denying defendant's motion to quash the petition and overruling its demurrer to the petition and writ, it appealed. Reversed.

*F. W. Root, Nelson J. Wilcox, O. W. Dynes and Burton Hanson,*  
for appellant.

*Lyndon A. Smith, Attorney General, and Alonzo G. Edgerton,*  
Assistant Attorney General, for respondent.

BUNN, J.

The state petitioned for a writ of mandamus to compel defendant to cease to charge in excess of two cents a mile as passenger fare where the passenger traveled a distance exceeding five miles. An alternative writ was issued, and defendant demurred and moved to quash. The demurrer was overruled and the motion denied. The trial court certified that the question presented by the demurrer was important and doubtful, and defendant appealed from the order.

The sole question involved is the construction of the so-called Bendixen law (Laws 1913, p. 775, c. 536), which, omitting immaterial parts, is as follows:

"No railroad company shall charge for transporting any passenger any sum in excess of the following prices, viz.: For a distance not exceeding five miles, three cents per mile; for all other distances, two cents per mile."

The question is this: When the distance exceeds five miles, is the company entitled to receive three cents per mile for the first five miles, and two cents per mile for the distance in excess of five miles, or but two cents per mile for the entire distance? If, for instance, the distance between two stations is seven miles, is the legal fare 19 cents or 14 cents?

The trial court adopted the construction contended for by the state, holding that the railway company was entitled to charge a maximum rate of three cents a mile only when the distance traveled

by the passenger did not exceed five miles, and that the maximum rate for all distance in excess of five miles was two cents a mile for the entire distance.

The language of the act is not free from ambiguity. The meaning of the word "other," as used in the phrase "all other distances," even when considered without the aid of extraneous evidence, is not free from uncertainty. "Other" is an adjective that has various meanings and various shades of meaning. Reference to dictionaries discloses many synonyms. We are here concerned only with the question whether the legislature, in using the word, meant all distances *different* in length from those mentioned, or all distances *additional* to those mentioned. The lexicographers give both definitions. The word often conveys the idea of "different or distinct from that already mentioned," but is as often used to express the idea of "additional," or "further." It is not difficult to cite examples of both meanings as well as of uses of the word that convey the thought of both "additional," and "different" in kind or quality. When we say in an opinion that there was "other evidence to support the verdict," or "other reasons" for a conclusion, we plainly mean evidence additional to that particularly referred to, reasons additional to those pointed out. If one says: "I have other enemies," "there are other men who think as I do," "I have other things to do," while there may be some idea of distinction between the person or thing mentioned, and the "other" persons or things, the main impression conveyed is that of further or additional persons or things. As readily perhaps may be given examples where the word clearly means "different" or "distinct" from that mentioned. Enough has been said to show plainly that there is ambiguity in the act itself, an uncertainty as to what the language employed means. In such case we are entitled to consider and should consider not only the language of the entire act, but all evidence which will throw light on the intention of the lawmakers. In short, it is a case where a bare reading of the statute does not suffice to enable us to ascertain and understand its meaning, and where, consequently, there is room for construction.

We would be inclined to agree with the construction of the trial

court, if there was nothing to guide us "other" than the language used. It cannot be denied that apter words might have been chosen to convey the idea of a three cent fare for the first five miles of every journey, and a two cent fare for the additional mileage travel. But persuasive reasons exist for the "other" construction.

We are not clear as to the object of the lawmakers in fixing a maximum charge of three cents per mile for distances not exceeding five miles, whatever the correct interpretation of the act is. But we are able to see no reason for the provision if the construction contended for by the state is the right one, while it may be said that the legislature had in mind an extra cent per mile for five miles as an allowance in the nature of a terminal charge. If this was the idea, and we can conceive of no other explanation, it is manifest that the allowance would give the carrier substantially no benefit if it is to be made only when the passenger's journey is five miles or less, while, if 15 cents may be charged for the first five miles of every passenger's trip, the allowance would be quite a substantial one. The revenue at the rate of three, four or five cents from each passenger who traveled three, four or five miles and no farther, would amount to a very inconsiderable sum. Whether the idea was to make an allowance in the nature of a terminal charge, or simply to make the law somewhat less liable to be held confiscatory than the one at the time under fire in the Supreme Court of the United States, it can hardly be conceived that the legislature would solemnly grant such an infinitesimal benefit, or such a small concession.

If the construction adopted by the trial court is the correct one, the result is a manifest absurdity. For a distance of five miles the carrier may charge 15 cents, for six miles but 12 cents, and for seven miles but 14 cents. This is a greater fare for a lesser distance, a result not only absurd in itself, but in direct violation of well known statutes of the state on the subject of regulating transportation charges of railroads. G. S. 1913, § 4285 (R. L. 1905, § 2007), prohibits unequal or unreasonable charges for the transportation of passengers. Section 4332 (R. L. 1905, § 2009), makes it unlawful for a common carrier to make or give any unequal or unreasonable preference or advantage to any particular person, or

to subject any particular person to any unequal or unreasonable prejudice in any respect whatever. Section 4347 (R. L. 1905, § 2017), the "long and short haul section," makes it illegal to charge or receive any greater compensation for the transportation of passengers for a shorter than for a longer distance over the same line.

If the Bendixen law is to be construed as contended by the state, it is plain that the result is inequality in charges, and a greater fare for a shorter distance. We cannot think for a moment that the legislature intended to repeal the prior statutes. They must be construed to harmonize with the one under discussion, in *pari materia*. The trial court agreed that the railroad company must obey the prior statutes against discrimination and overcharges, but suggested that this could be accomplished by the company reducing the rate for distances of five miles or less. This is perhaps a plausible argument, but we are convinced that it is unsound. It amounts to this: The company, in order to obey the prior statutes, must release all benefit from the present one. No case can be figured out where a charge of 15 cents for a five mile trip would not be unequal, discriminatory, and, as to distances between five and seven miles, violate the long and short haul clause. Therefore the act under consideration gives no benefit whatever to the carrier, or rather the carrier is obliged to forego any benefit that it was intended to give. It follows inevitably that this would annihilate the three cent per mile provision of the law. Instead of harmonizing apparently conflicting statutes, so as to give effect to both, the construction contended for by the state would make one of the statutes futile and purposeless. On the other hand, the construction contended for by defendant makes the two statutes entirely consistent, enables the company to receive some benefit from the second statute without violating the first.

For the reasons above stated, we hold that under the law in question a carrier may charge three cents per mile for the first five miles of every passenger's trip. This conclusion is reached notwithstanding the statements that the "authorities" of the state of Michigan have construed a similar statute of that state as the relator would have us construe this, and that many of the railroads in this state

have acceded to this construction. There has been no judicial decision, and we are unable to see that there has been any settled practical construction of the act that should influence our decision.

Order reversed.

HALLAM, J. (dissenting).

It appears to me this statute permits a charge of three cents a mile only for a trip not exceeding five miles and that for trips of greater distance the maximum is still two cents for every mile traveled.

The statute is crude and as between stations five, six and seven miles apart it will become necessary to construe it in connection with other statutes of the state. It appears to me, however, that the sole purpose and intent of the act was to permit a higher rate per mile on short than on long trips on the same principle as the provision in the act of 1911 (p. 458, c. 331), which it superseded, provided "that no railroad company shall be required to carry a passenger any distance for less than 5 cents."

I cannot agree that it was the purpose or intent of the act of 1913 to authorize an increase of five cents in the rate then allowed by law, on every trip over five miles.

---

J. S. GREEN v. NORTHWESTERN TRUST COMPANY and  
Another.<sup>1</sup>

December 18, 1914.

Nos. 18,999—(27).

**Appeal and error — no reversal for exclusion of evidence, when.**

1. Though the trial court in an equity case erroneously excludes testimony

<sup>1</sup> Reported in 150 N. W. 229.

---

Note.—The authorities on the presumption as to law of other state as to usury are gathered in notes in 21 L.R.A. 471 and 67 L.R.A. 60.

bearing upon material facts in issue, and rejects offers to prove them, the case will not be reversed for such errors if, with the facts taken as the party offering the proof claims them to be, there could be no result in the case other than that reached by the trial court.

**Usury — presumption of legality, when.**

2. Where notes are claimed to be usurious, and there is no expressed or actual intent as to whether the governing law of the transaction is the law of one state or another, to either of which it may with propriety be referred in part, and there is no attempt to evade the usury law, the court will indulge the presumption that the law of the state which upholds the transaction is the law intended by the parties; and applying this rule it is held that the law of Montana, under which the transaction involved was valid, was the proper law of the contract where purchase money notes were made to a corporation of that state, secured on lands located there, sold to a South Dakota corporation, having an office in Minnesota, under the laws of which the transaction was invalid, though the negotiations were had in Minnesota, and the notes executed and payable there, and the trust deed securing them executed there to a Minnesota trust company as trustee.

Action in the district court for Ramsey county to restrain defendant land company from paying to the Northwestern Trust Co. and the trust company from receiving from the land company any interest upon the land company's indebtedness, and to restrain the trust company from instituting proceedings to foreclose a mortgage given by the land company to the trust company to secure the payment of certain notes and interest. The case was tried before Kelly, J., who made findings and ordered judgment in favor of defendants. From an order denying plaintiff's motion for a new trial, he appealed. Affirmed.

*Harris Richardson and Walter Richardson, for appellant.*

*Butler & Mitchell, for respondent.*

**DIBELL, C.**

This action was brought by the plaintiff, a stockholder in the Cartersville Irrigated Land Co. against that company and the Northwestern Trust Co. to enjoin the Cartersville company from paying and the trust company from receiving interest upon certain notes made by the Cartersville company to the Rosebud Land &

Improvement Co., secured by a purchase money mortgage in the form of a trust deed made by the Cartersville company to the trust company as trustee, and to enjoin the trust company from proceeding to enforce the mortgage. There were findings for the defendants and the plaintiff appeals from an order denying his motion for a new trial.

1. On November 23, 1911, the Rosebud Co. and the plaintiff Green entered into a contract for the sale of certain Montana lands, the contract setting forth the agreement in detail. This contract Green assigned to the Cartersville Co. on December 6, 1911. On December 20, 1911, the Rosebud Co. conveyed the lands to the Cartersville Company.

During the summer of 1911 negotiations were had in Montana between the Rosebud Co. and Green relative to the disposition of these lands. The Rosebud Co. claimed that these negotiations had reference to a sale to Green and that they resulted in the conveyance to the Cartersville Co. Green claimed that he was acting as agent for the Rosebud Co.; that if he made a sale he was to have a commission; that the contract of November 23, 1911, which was acknowledged by the company on November 18, was executed for the purpose of enabling him to dispose of the lands to certain Minneapolis people; that these people did not complete the proposed purchase; that he then associated himself with other parties, with whom he was to have a joint interest, and that the contract was delivered to him by the Rosebud Co. as a matter of convenience in completing this transaction; and that the negotiations with reference to this transaction, which was completed when the conveyance to the Cartersville Co. was made, were had in Minnesota.

The real question in the case being whether the transaction was governed by the Minnesota law or by the Montana law, as is explained hereafter, the inquiry as to the nature and place of these negotiations was important. The court found that Green was not the agent of the Rosebud Company. There was evidence that he was and that he was not. The court sustained objections to pertinent questions put by plaintiff's counsel upon the issue, and sustained objections to plaintiff's offers to prove the facts as he claimed them to be, both as to

Green's agency and as to the negotiations culminating in the deed to the Cartersville Co. In this the court erred. Ordinarily such an error, infecting as it did material facts in issue, results in a new trial. If, however, from the facts properly found, and the other facts found as the plaintiff claims them to be, including the facts in proof of which evidence was rejected, there could be but one result, and that the one reached by the trial court, a new trial should not be had; that is, if from the facts properly found, and the other facts taken to be as the plaintiff claims them, the law declares the transaction a valid one, a new trial is unnecessary. This is such a case. Therefore, in reciting the facts, additional to those properly found, they are assumed to be as the plaintiff by his rejected proofs offered to show them.

2. The ultimate question, upon which the rights of the parties depend, is whether the Montana law or the Minnesota law is the governing law of the transaction brought in question.

The facts, as we have them for the purposes of this appeal, are not in controversy and are not complicated.

The Rosebud Co. is a Montana corporation. It has no office elsewhere. Its officers and stockholders reside in Montana. The plaintiff Green is a resident of Montana. The trust company is a Minnesota corporation. The Cartersville Co. is a South Dakota corporation, organized there in December, 1911. It does business and has its principal office in Minneapolis, though it did not obtain the required license until after the transactions here involved. Its connection with the state of its birth has never been more than nominal.

On November 23, 1911, the Rosebud Co. and the plaintiff Green entered into a contract of sale of certain Montana lands, the contract before mentioned. This contract was executed in Montana by the Rosebud Co. and was delivered by its president J. E. Edwards to Green at Minneapolis and was by the latter signed there. It was then returned to Montana. It was delivered as the result of negotiations had in Minnesota. It was originally executed for use in a sale attempted by Green as agent of the Rosebud Co., which was not completed. One C. H. Wagner and one W. O. Williams were interested with Green in this contract. This the Rosebud Co. knew.

It was at the time contemplated by Green and his associates that a corporation would be organized to take over the lands included in the contract. The Cartersville Co. was organized under the laws of South Dakota for this purpose. Green, Wagner and Williams, together with a resident of South Dakota, were its incorporators.

The contract of November 23, 1911, contained this provision relative to the trust deed:

"Said trust deed or mortgage, trust deeds or mortgages, executed in conformity with the terms hereof, in other respects to contain such terms and provisions as are ordinarily contained in like indentures and instruments within the state of Montana, and to be in such form as the party of the first part shall desire and elect at the time of the execution thereof."

On December 6, 1911, Green made a formal assignment of the contract to the Cartersville Company. On December 20, 1911, the Rosebud Co. deeded the Montana lands to the Cartersville Company. Edwards, the president of the Rosebud Co., executed the deed in Minnesota and delivered it. It was attested by Beattie, the secretary of the company, and the corporate seal attached, apparently in Montana.

On December 20, 1911, the Cartersville Co. executed and delivered to the trust company a mortgage in the form of a trust deed to secure the promissory notes representing the unpaid purchase price. The notes ran to the Rosebud Co. They were delivered to Edwards at Minneapolis and by him given to the Rosebud Co. in Montana. Of the purchase price \$25,000 was paid in cash or in notes accepted in lieu of cash. The balance of the purchase price was represented by notes. One note for the sum of \$25,000 was payable on January 1, 1913, and one for \$772.21 and one hundred and sixty-three for \$1,000 each were payable on January 1, 1918. The amount secured by the trust deed was \$188,772.20. These notes drew interest at the rate of six per cent per annum, payable annually, and the usual coupons were attached. The notes contained this provision:

"And it is agreed that any unpaid principal or interest after the same becomes due shall bear interest at the rate of eight per cent. per annum, payable annually."

The coupons contained this provision:

"This coupon note bears interest at the rate of eight per cent. per annum after maturity."

The Minnesota statute provides as follows:

"Contracts shall bear the same rate of interest after they become due as before, and any provision in any contract, note, or instrument providing for an increase of the rate of interest after maturity, or any increase therein after making and delivery, shall work a forfeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest before maturity." G. S. 1913, § 5805 (R. L. 1905, § 2733.)

The provision for an increase of interest after maturity is valid under the Montana law. Its effect under the Minnesota law is to forfeit all interest reserved. *Chase v. Whitten*, 62 Minn. 498, 65 N. W. 84.

Under the facts recited the question is whether these notes are governed by the Montana law and are valid, or whether they are governed by the Minnesota law and are so far invalid as to result in a forfeiture of the interest.

If the intent of the parties is expressed, or an actual intent is found, either that the Minnesota law govern, or that the Montana law govern, such intent must be given effect. If the intent is not expressed or an actual intent found, the court must find the presumed intent and such presumed intent then fixes the governing law.

In Dicey, *Conflict of Laws*, pp. 560, 561, these rules are stated:

"When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption.

"When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract."

In this case no intent was expressed. Neither, as we shall see,

can an actual intent that the Minnesota law, or the Montana law, govern be found.

In a search for the actual intent of the parties when none is expressed, there is an element of legal jugglery. Usually parties to transactions of this nature, referable to one state or another, or in part to one state and in part to another, have no unexpressed but actual intent as to the law which shall control. The question of what law governs does not suggest itself to them. Why should it? They engage in a transaction from which each hopes to profit, intending that it will be carried out as agreed. In looking at the case before us it is evident that the Cartersville Co. could not have had, consistently with an honest purpose, when it made the mortgage and notes aggregating \$188,772.21, evidencing deferred payments on land for which it had made an initial payment of but \$25,000, all of the deferred payments, except \$25,000, running for six years, an actual intent that the interest reserved, aggregating upwards of \$60,000, need not be paid; and it is evident that the Rosebud Co. could not have intended, consistently with ordinary business sagacity, when it received the notes, that none of the interest promised it need be paid; and it is evident that the trust company, acting in a trust capacity, could not have intended taking a deed of trust, securing notes payable to the beneficiary of the deed, on which, contrary to their terms, no interest need be paid.

The suggestion is not that a transaction is free of usury because the parties to it do not know that there is a usury law. The contrary is true. If they contract for forbidden interest, though without moral wrong, not knowing that there is a usury law to violate, they are subject to the penalties of usury. 29 Am. & Eng. Enc. (2d ed.) 464. But when the circumstances determinative of the governing law are equivocal and the determination of what the governing law is must be made by resorting to the presumed intent of the parties as to what law shall govern—that of one state which leaves the transaction valid or that of the other which makes it usurious and illegal—a strong presumption is indulged that the intent was to contract with reference to the law of the state where the transaction is valid; and the presumption in a particular case may be conclusive.

It is competent for the parties to select any state, provided the transaction is referable in part to that state as the one having the governing law, if this is done without an intent to evade the usury law. "It is doubtless essential to the application of this principle that one or more of the important elements of the contract, or significant circumstances of the transaction, shall have had their situs at the place whose law would uphold the contract." 2 Wharton, Conflict of Laws (3d ed.), p. 1200. The parties cannot arbitrarily assign their contract to a particular state. *American Freehold Land & Mtg. Co. v. Jefferson*, 69 Miss. 770, 12 South. 464, 30 Am. St. 587. Effect can be given to the presumed intention that the law of a particular state shall be the governing law only when such state has a vital connection with the transaction; or where elements of the contract, important in determining the governing law, have their situs in such state. 39 Cyc. 899; 2 Wharton, Conflict of Laws, (3d ed.) p. 1198, et seq.

The transaction here in question was vitally related to Montana. The Rosebud Co. was a resident of Montana. So were its officers and stockholders. The plaintiff, who was the vendee in the contract of November 23, 1911, and a promoter and incorporator and a large stockholder of the Cartersville Co., resided there. The contract of sale was signed there, and was returned there, though originally intended for a different transaction. The land conveyed was there. The mortgage was drafted there. It was for unpaid purchase money and was secured upon lands located there. The notes were negotiable in Montana and non-negotiable in Minnesota. The Cartersville Co. covenanted in the trust deed to pay the taxes and assessments levied in Montana, including irrigation taxes. It had the right by the trust deed to sell portions of the mortgaged lands at not less than specified prices, and upon payment of a certain percentage of the price received was entitled to a release of the mortgage as to the lands sold. It covenanted to keep the buildings, fences, ditches and other improvements on the Montana lands in repair. It was contemplated by the November contract that the mortgage should contain, as it did, clauses usual to Montana

mortgages. The connection between the transaction here involved and Montana was not artificial.

Opposed to the claim that the presumed intent was that the law of Montana should be the governing law, and supporting the contention that the Minnesota law should be presumed to be intended to be the governing law, these considerations are urged: The notes were signed, delivered and payable in Minnesota. The trust deed, and the deed of the lands except as to the signature of the secretary, were executed here. Both were delivered here. The mortgagee was a corporation of this state. The mortgagor had its principal office in Minnesota. All of the negotiations relative to the transaction were had in Minnesota.

There was no intent to evade the usury law. The Cartersville Co., the Rosebud Co., and the Trust company, had no thought of engaging in other than a lawful and honest transaction. Indeed, there was no greed for interest. If the notes had provided for interest at 8 or 10 per cent. from the beginning, instead of an advance from six to eight per cent. on principal and interest in default, more interest would have been received and the Minnesota law would not have been offended.

The courts go far in giving effect to the presumption that the parties intended their contract to be performed in the state where it could be validly performed according to its terms, rather than in a state where it would be wholly or in part invalid. Thus, in *Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638, the court said:

"It cannot be presumed that the parties intended to enter into an illegal contract. The presumption is rather in favor of its validity. The law will presume an honest intention, unless there is something in the nature of the transaction or in the proofs to establish the contrary."

In *Hieronimus v. New York, N. B. & L. Assn.* 101 Fed. 12, affirmed in 107 Fed. 1005, 46 C. C. A. 684, the court said:

"And it is well settled by the decisions of the United States supreme court that a contract is governed by the law with a view to which it is made; and it is to be presumed, in the absence of any

express declaration or controlling circumstances to the contrary, that the parties had in contemplation a law according to which their contract would be upheld, rather than one by which it would be defeated."

Other cases, valuable because of their statement or discussion of the principle, but not cited because parallel in their facts, are the following: *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540; *New England &c. Co. v. Vader*, 28 Fed. 265, 270; *Newman v. Kershaw*, 10 Wis. 275; *Jackson v. American Mtg. Co.* 88 Ga. 756, 15 S. E. 812; *Whitlock v. Cohn*, 72 Ark. 83, 80 S. W. 141; *Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264; *Cromwell v. Sac County*, 96 U. S. 51, 24 L. ed. 681; *United States Savings & Loan Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006. And see 22 Am. & Eng. Enc. (2d ed.) 1330; 39 Cyc. 899; 2 Wharton, Conflict of Laws (3d ed.) § 510g.

There is nothing in *Finnes v. Selover*, Bates & Co. 102 Minn. 334, 113 N. W. 883; *Walsh v. Selover*, Bates & Co. 109 Minn. 136, 123 N. W. 291; or *True v. Northern Pacific Ry. Co.* 126 Minn. 72, 147 N. W. 948, at variance with the views expressed.

Applying the rules stated we hold that the law of Montana was the proper law of the contract, and that its law, under which the transaction involved is valid, is the governing law. Under the facts, putting them as favorably to the plaintiff as is possible, it would be intolerable to require or to permit the Cartersville Co. to disavow its assumed obligation to pay interest on the purchase money notes. The law will conclusively presume the Montana law to be the intended governing law.

Order affirmed.

STATE v. AMOS FLOCKEY.<sup>1</sup>

December 18, 1914.

Nos. 19,068—(15).

**Robbery — verdict sustained by evidence.**

In a prosecution for robbery the evidence is *held* sufficient to support the verdict of guilty, and that there was no abuse of discretion in denying a new trial on the ground of newly discovered evidence.

Defendant was indicted by the grand jury for the crime of robbery, tried in the district court for Hennepin county before Booth, J., and a jury, and convicted. From an order denying his motion for a new trial, defendant appealed. Affirmed.

*John F. Bernhagen*, for appellant.

*Lyndon A. Smith*, Attorney General, *James Robertson*, County Attorney, and *Mathias Baldwin*, First Assistant County Attorney, for respondent.

BROWN, C. J.

Defendant was convicted of robbery and appealed from an order denying a new trial.

It appears from the evidence offered by the state that on December 30, 1913, at about 9:30 o'clock, p. m. defendant and two companions called at the residence of complainant for the ostensible purpose of making inquiry concerning the sale by complainant of a mortgaged team of horses. This was a means to an end and not the real object of the call. Complainant was not at home at the time and the parties awaited his return from a temporary absence. Complainant's wife was at home but had retired for the night. Complainant soon returned and after some moments of conversation he was violently seized by two of the men and held while the third forcibly took from him the sum of about \$125. Complainant notified the police, and

<sup>1</sup> Reported in 150 N. W. 168.

defendant was arrested the following day and charged with being a participant in the crime. He was taken to police headquarters and upon being questioned admitted his connection with the matter, and stated also that the money was divided between the parties. Complainant had personally known defendant for a number of years, and positively identified him as one of the persons who committed the robbery. Defendant was a witness in his own behalf, and admitted that he was at the residence of complainant at about the hour when it is claimed the crime was committed; that he accompanied the other men, who desired information concerning the mortgaged team, at their request and because they did not know the street or number of complainant's residence. One of these persons he knew only as "Tom," and did not know the other person at all, who appears to have been a friend of Tom. He further testified that he took his departure immediately on the return of complainant and after informing him of the object of the visit, and further that no robbery was contemplated by him when taking the parties to complainant's residence, and none was committed by the other persons during the time he was present. He testified that at the time of his arrest he was badly intoxicated and had no recollection of making any statements to the officers; nor had he any recollection of making any statements to them the following day.

Defendant's motion for a new trial included the ground of newly discovered evidence, and the principal contention on this appeal is that the trial court erred in not granting a new trial on that ground. Two affidavits were presented in support of this part of the motion, one by the wife of complainant, and the other by one Meyer. The affidavit of the wife was to the effect that, between 6:30 and 7 o'clock p. m. of the day in question, "three men came to my room while my husband" "was absent and took, stole and carried away from my possession the sum of one hundred dollars, more or less," that she was not acquainted with the men and did not know either of them; that the money belonged to her husband, and was given to her by him at about 5 o'clock in the evening of that day. The affidavit of Meyer was to the effect that he saw complainant at the saloon of one Stearn at about 7 o'clock, making an effort to call the police over

the telephone to inform them of the theft of this money. The contention of defendant is that if the affidavit of the wife and Meyer be true, the crime charged and attempted to be proven by the state was not committed as so charged, namely, at 9:30 o'clock, and from complainant, on the contrary was committed at the time stated in the wife's affidavit and from her during complainant's absence. And it is insisted that the new evidence clearly disproves the charge and that it was an abuse of discretion to deny a new trial. In this we do not concur. It appears that complainant was somewhat under the influence of liquor during the day in question and left this money with Stearn, the saloonkeeper, for safe keeping. It was returned to complainant at about 5 o'clock in the afternoon, and he took it to his home and placed it in charge of his wife who was ill at home and in bed. Complainant testified that when defendant and the other men came to the house at 9:30 o'clock he took the money from under the wife's pillow and put it in his pocket, and that defendant and his companions immediately forcibly took it from him. The affidavit of the wife, stating that the money was taken from her between 6:30 and 7 o'clock, during the absence of complainant, evidently does not state the facts as they actually occurred. The evidence received on the trial discloses the fact that she was quite sick, suffering from paralysis, and unable to speak intelligently, and the excitement incident to the commission of the crime undoubtedly disturbed her to such an extent that she subsequently did not know the true situation, and probably believed that the money was taken from her by one of the robbers, when it was in fact taken by her husband as he testified on the trial. The discrepancy in respect to the precise time of the crime is not of controlling importance. She was confused and it is not shown that she was in a position to know the precise hour at which the crime was committed. The same may be said of the affidavit of Meyer, fixing the hour at which complainant was at the saloon calling over the telephone for the police. He evidently was mistaken as to the hour. At any rate the affidavits were for the consideration of the trial court, and we discover no reason for holding that it was an abuse of discretion to deny the motion for a new trial.

The evidence fully sustains the verdict, and the order appealed from must be affirmed.

Order affirmed.

---

STATE ex rel. VIRGINIA & RAINY LAKE COMPANY v.  
DISTRICT COURT OF ST. LOUIS COUNTY and Others.<sup>1</sup>

December 18, 1914.

Nos. 19,144—(300).

**Injury to servant—liability of master.**

1. The test for determining whether one person is the employee of another, within the rule making the employer responsible for injuries resulting from the negligence of his employee, is whether such person possessed the power to control the other in respect to the transaction out of which the injury arose.

**Respondent superior—applicability of rule.**

2. The court cannot determine, as a question of law, that the rule of *respondent superior* does not apply, unless the evidence shows conclusively that the alleged employer possessed no such power of control.

**Findings sustained by evidence.**

3. Under the above tests the evidence was ample to sustain the finding of the trial court.

**Workmen's Compensation Act—construction.**

4. The Workmen's Compensation Act is remedial in its nature and must be given a liberal construction to accomplish the purpose intended. The provisions defining when the relation of employer and employee exists bring within the act all cases in which, under the above rule, such relation is found to exist.

Upon the relation of Virginia & Rainy Lake Co. this court issued its writ of *certiorari* directed to the district court for St. Louis

<sup>1</sup> Reported in 150 N. W. 211.

---

Note.—The general question as to who are independent contractors is treated in notes in 65 L.R.A. 445 and 17 L.R.A.(N.S.) 371.

county and to Honorable Bert Fesler, one of the judges thereof, commanding them to return to this court a transcript of all the records of proceedings in said court in an action wherein Stanley Bashko was plaintiff-employee and the Virginia & Rainy Lake Co. a corporation, was defendant-employer. Affirmed.

*Abbott, MacPherran, Lewis & Gilbert*, for relator.

*Charles E. Adams*, for respondent.

TAYLOR, C.

The respondent, Bashko, while engaged in getting out ties, poles and posts for the relator, the Virginia & Rainy Lake Co., received an injury which resulted in the loss of the sight of one eye. He made application to the district court of St. Louis county for compensation therefor under the so-called Workmen's Compensation Act. The court sustained his claim, and adjudged that the company should pay the compensation specified in the act in accordance with the provisions thereof. The company brought the matter before this court by *certiorari*, and contends that Bashko was not an employee but an independent contractor. The only question for decision is whether the evidence is sufficient to sustain the finding of the district court that Bashko, at the time of the accident, was an employee of the company within the meaning of the compensation act.

The company owned large tracts of timber land in the northern part of the state, and were engaged in cutting, preparing and removing the merchantable timber therefrom. They maintained camps at convenient points in which to board and lodge the men engaged in the work. In addition to the men employed at monthly wages, there were a large number engaged in cutting and preparing timber at a specified price per piece and known as "piece-makers." Bashko was a "piece-maker." He boarded at the camp, but paid an agreed price per week for his board. He also paid to the company one dollar per month as a hospital fee, which entitled him to care and treatment in a hospital in case of sickness or injury. The amount due for board and hospital fee was deducted by the company from his earnings. He procured the tools used in his work from the company, and they were charged to him with the understanding that

he could either pay for the use of them or purchase them outright. He subsequently concluded to purchase them, and by his direction the price was deducted from his earnings. The company assigned him a specific tract of its land upon which to work, and marked out the boundary between this tract and the tracts allotted to others. He was required to cut the merchantable timber clean as he went, and to manufacture it into ties, poles and posts according to specifications furnished him by the company, and also to pile the brush ready for burning. He was to be paid at a specified rate per piece for all timber cut and prepared in accordance with the specifications. This rate varied according to the size, character and grade of the different ties, poles and posts. The company had an inspector and a foreman, each of whom inspected the work once or twice a week to see that it was properly performed and that the requirements of the specifications were complied with. Under the agreement, Bashko could work as much or as little as he wished; could lay off whenever and as long as he chose; could work as many or as few hours per day as he saw fit; could proceed in his own way so far as his method of working was concerned; and could quit finally whenever he elected to do so. It does not appear that there was any fixed time for payment. Whenever requested the company counted the ties, poles and posts of the various kinds and grades, and paid him therefor according to the stipulated schedule of prices.

This court, in common with courts generally, has held that one person is not liable for injuries caused by the negligence of another, unless such person possessed the power to control the acts of the other in respect to the transaction out of which the injury arose; and that the test for determining whether one person is an employee of another, within the rule making the employer responsible for the negligence of his employee, is whether the alleged employer possessed such power of control. 2 Dunnell, Minn. Digest, § 5835, and cases cited in note 49.

The relator relies upon this rule, and insists that the test shows that Bashko was not an employee but an independent contractor. We think the evidence is sufficient to have required the submission of the question to a jury, if it had arisen in an ordinary action at law.

*Waters v. Pioneer Fuel Co.* 52 Minn. 474, 55 N. W. 52, 38 Am. St. 564; *Barg v. Bousfield*, 65 Minn. 355, 68 N. W. 45; *Rait v. New England F. & C. Co.* 66 Minn. 76, 68 N. W. 729; *Klages v. Gillette-Herzog Mnfg. Co.* 86 Minn. 458, 90 N. W. 1116; *Brown v. Douglas Lumber Co.* 113 Minn. 67, 129 N. W. 161. In the *Rait* case, the defendant employed a contractor to repair a leaky roof. There was no evidence that it reserved any control or supervision over him, except the inference arising from the character of the work and from the fact that it owned and occupied the building. In considering whether the defendant was responsible for the negligence of an employee of the contractor the court said: "Under all the circumstances, it was, at least, a question for the jury to say whether, in employing Dinsmore to fix this roof, the defendant surrendered all control over his actions as to the manner of removing the ice and snow from the roof of the building." In the *Klages* case the court considered the prior cases, and held, in effect, that unless it appeared conclusively that the right to control and supervise the work was not reserved, the question as to whether the relation of employer and employee existed was for the jury.

In the present case *Bashko* did not contract to perform a specific and definite undertaking nor to accomplish a specific and agreed upon result. He did not agree to cut any specific quantity of timber, nor to cut the timber from any specific quantity of land. The company owned the timber and wanted it made into ties, poles and posts. It had established a schedule of prices which it paid for piece-work. *Bashko* had worked at piece-work for some years and could earn more than ordinary wages at such work. He applied for a job getting out timber by the piece and the company set him to work. The company had a large number of men doing the same kind of work upon the same terms. It is not likely that the owners of valuable timber would permit ordinary workmen to cut and manufacture it for them wholly free from supervision or control. The evidence tends to show that the company did not surrender but reserved the right to supervise and control the work of *Bashko*, at least to the extent necessary to prevent waste and loss. They required him to cut the timber clean as he went, and to manufacture it according to specifi-

cations furnished by them, and also to pile the brush. They inspected his work from time to time and occasionally directed him to remedy defects therein. They had the right to discharge him at any time, and this right afforded adequate means for controlling his work. The evidence was ample to sustain the finding of the trial court under the rule invoked.

The compensation act is remedial in its nature and must be given a liberal construction to accomplish the purpose intended. It provides: "The term 'employer' as used herein shall mean every person \* \* \* who employs another to perform a service for hire, and to whom the 'employer' directly pays wages. \* \* \* The terms employee and workman \* \* \* shall be construed to mean \* \* \* every person \* \* \* in the service of another under any contract of hire, express or implied, oral or written." Section 34, c. 467, p. 692, Laws 1913 (section 8230, G. S. 1913). It is not necessary to construe these provisions, nor the somewhat ambiguous and obscure provisions of section 32 [p. 690] of the act (section 8228, G. S. 1913), further than to say that they certainly do not confine the relation of employer and employee within any narrower limits than did the rule invoked by the relator.

The decision of the district court is affirmed.

---

## JOSEPH KLASEUS v. VILLAGE OF KASOTA.<sup>1</sup>

December 24, 1914.

Nos. 18,897—(134).

### Bridge—negligence of village.

1. The evidence justified a finding of the jury that the defendant was negligent in failing to provide a guard rail of sufficient height on a bridge which it maintained.

<sup>1</sup>Reported in 150 N. W. 221.

---

Note.—As to municipal liability for injury to travelers by defective bridges through defect in plan of construction, see note in 67 L.R.A. 268.

**Proximate cause.****2. The question of proximate cause was for the jury.**

Action in the district court for Le Sueur county to recover \$200 for the loss of plaintiff's horse. The case was tried before Dickson, J., acting for the judge of the Eighth judicial district, and a jury which returned a verdict in favor of plaintiff for \$125. Defendant's motion for judgment notwithstanding the verdict or for a new trial was denied. From the judgment entered pursuant to the verdict, defendant appealed. Affirmed.

*Thomas Hessian*, for appellant.

*C. O. Dailey*, for respondent.

**DIBELL, C.**

The plaintiff was driving his team over a bridge which spanned Chanchaska creek in the village of Kasota. An automobile approached from the opposite direction. His team became frightened and unmanageable and one of them was crowded over the edge of the bridge to the creek below and was killed. He brought this action to recover damages for the loss of his horse and had judgment. The defendant appeals from the judgment.

1. The negligence alleged is in having a guard rail of insufficient height. There is no claim that it was out of repair or defective except in plan of construction. A municipality may be liable because of an unnecessary defect in the plan of construction. *Blyhl v. Village of Waterville*, 57 Minn. 115, 58 N. W. 817, 47 Am. St. 596; *McDonald v. City of Duluth*, 93 Minn. 206, 100 N. W. 1102.

There was an arched culvert over the creek and the space above was filled in. The bridge was  $17\frac{1}{2}$  feet wide from rail to rail, something like 30 feet long; there were approaches to it from either end, and the creek was something like 31 feet below. There is evidence that the guard rail was from 2 feet 4 inches to 2 feet 6 inches high. This the jury might have taken to be true. There is evidence that it was higher. Those who give it a greater height say it was about the usual height of railings on other bridges. The location of the

bridge, with streets approaching it on a curve, perhaps added an element of danger.

The facts are not strong for the plaintiff, but we are of the opinion that the jury might properly find negligence in the defendant in failing to provide a sufficient guard rail.

2. It is the contention of the defendant that the insufficient guard rail was not the proximate cause of the injury; and that the proximate cause was the frightening of the team by the automobile. The question of proximate cause was for the jury. See *Wiles v. Great Northern Ry. Co.* 125 Minn. 348, 147 N. W. 427, and cases cited.

Judgment affirmed.

---

JOHN BRENNAN v. THOMAS KEATING.<sup>1</sup>

December 24, 1914.

No. 18,903—(138).

**Pleading prior dismissal as bar to subsequent action.**

Demurrer held properly sustained to the specific defense, based primarily on G. S. 1913, § 7825, of two prior dismissals, without defendant's consent, of actions against him upon the same cause of action herein involved.

Action in the district court for Crow Wing county to recover \$24,898.36 for professional services in reference to exploring, developing and leasing mineral lands owned by defendant. From an order, Wright, J., sustaining plaintiff's demurrer to paragraph 10 of the answer, defendant appealed. Affirmed.

*M. E. Ryan and W. P. Crawford*, for appellant.

*John Brennan*, pro se.

PHILIP E. BROWN, J.

Appeal by defendant from an order sustaining a general demurrer to a paragraph of the answer.

<sup>1</sup>Reported in 150 N. W. 397.

128 M.—4.

The substance of the allegations demurred to is: That prior to the bringing of the present action, plaintiff successively instituted two others against this defendant upon the same cause of action herein involved, the first being in the United States District Court for Minnesota and the other in a Wisconsin state court having jurisdiction of parties and subject matter, and that he voluntarily dismissed the first without defendant's consent and against his objection, such dismissal being entered of record as a judgment in the cause, and having thereafter brought the second he likewise, upon the disagreement of the jury to which it was tried, voluntarily dismissed it without notice to or consent of defendant, and procured an order of dismissal from the court; wherefore he has forfeited his right to and cannot now maintain this action.

Defendant's main contention in support of his pleading is based on G. S. 1913, § 7825, which provides:

"An action may be dismissed, without a final determination of its merits, in the following cases: (1) By the plaintiff at any time before the trial begins, if a provisional remedy has not been allowed, or a counterclaim made or other affirmative relief demanded in the answer: *Provided*, that an action on the same cause of action against any defendant shall not be dismissed more than once without the written consent of the defendant or an order of the court on notice and cause shown. \* \* \* The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register and notice to the adverse party."

In *Walker v. St. Paul City Ry. Co.* 52 Minn. 127, 53 N. W. 1068, this court held demurrable the specific defense, based on this same statute, of two prior dismissals of actions against defendant therein upon the same cause of action, the first in a district court of this state and the second in the United States Circuit Court therefor; both dismissals being without notice to or consent of defendant and the latter without cause shown. That case is, in any event, controlling; and, notwithstanding defendant's vigorous contention that it should be overruled, we decline to do so.

Moreover, the present case does not involve two prior dismissals within the meaning of the statute. The latter does not contemplate

actions in another state. Hence the Wisconsin action, the pendency of which, by the way, would not have been ground for abating a subsequent action in this state (*Sandwich Mnfg. Co. v. Earl*, 56 Minn. 390, 57 N. W. 938), must be left out of consideration; so that, even were we to accept defendant's construction of the statute, his answer alleged but one prior dismissal within its purview. Nor can it be taken as showing a dismissal of the Wisconsin action on the merits.

In the Walker case the court assumed, for the purposes of discussion, that the action in the Federal court should be treated as though it had been in a court of this state; but we have no occasion here to consider the correctness of that assumption.

Order affirmed.

---

## W. S. RIGLER and Others v. NATIONAL COUNCIL OF KNIGHTS AND LADIES OF SECURITY.<sup>1</sup>

December 24, 1914.

Nos. 18,910—(143).

### **Benefit society — expulsion of member.**

1. The laws of defendant society prescribing the grounds upon which members may be expelled and the procedure to be followed in the trial of charges against them are sufficient and valid. Such laws provide for a trial before the national executive committee, and for an appeal from the decision of that committee to the national council, and a judgment lawfully rendered by such committee is final and conclusive, unless an appeal be taken therefrom.

<sup>1</sup> Reported in 150 N. W. 178.

---

**Note.**—Upon the conclusiveness of a determination by tribunals of association, see note in 49 L.R.A. 363, 372. And as to the conclusiveness of a decision of the tribunal of a mutual benefit society expelling or suspending member, see note in 52 L.R.A.(N.S.) 806.

**Same.**

2. The committee having rendered a judgment of expulsion from which no appeal was taken, such judgment can be attacked, in this action, only upon the ground that it is void for failure to accord the assured such a trial as the laws of the society secured to her, and the record in this case will not justify a finding to that effect.

Action in the district court for Ramsey county to recover \$2,000 upon defendant's certificate of insurance. The case was tried before Olin B. Lewis, J., and a jury which returned a verdict for \$1,898.51 in favor of plaintiffs. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

*William G. White*, for appellant.

*A. J. Hertz and James E. Markham*, for respondents.

**TAYLOR, C.**

This suit is brought to recover the amount of a benefit certificate issued by defendant, a fraternal beneficiary association, to Mariem Rigler. Plaintiffs had a verdict and defendant appealed from an order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

The defendant association had a number of local councils, as the subordinate lodges are termed, in the cities of Minneapolis and St. Paul. Prior to March, 1910, it caused an investigation to be made to ascertain whether the laws and regulations of the order were being violated by certain of these councils, and whether benefit certificates had been fraudulently procured by members not entitled thereto. As a result of this investigation, charges were preferred against Zion Council No. 951 and against 56 members of that council, one of whom was Mariem Rigler, and also against some of the other councils and against many members of such other councils.

In the proceedings against the individual members, a general form of complaint was prepared, charging a violation of the laws of the order and containing six specifications of wrongful conduct. Most of these specifications charged misrepresentation or conceal-

ment as to age, health or family history of the accused member. Harvey E. Hall, a member of Imperial Council No. 1,000, had conducted the investigation, and he made a separate complaint against each accused member by inserting the name of such member in one of the forms above mentioned and signing and presenting it to the national president. The laws of the order provided for a trial upon such charges before the national executive committee, and for an appeal from the decision of such committee to the national council itself. They also provided for notice to the accused member of the charges against him and of the time and the place of trial. Due notice was given to Mariem Rigler to appear before the national executive committee, at Richmond Hall in the city of Minneapolis, at ten o'clock a. m. on April 7, 1910, and answer the charges against her, and show cause, if any there were, why her benefit certificate should not be cancelled for the reasons set forth in such charges. The hearing upon the charges against Zion Council No. 951, and upon the charges against all other members of that council was also set for the same time and place. On April 6, 1910, the national executive committee met in Minneapolis and considered the charges against Herzel Council No. 1188 and the members of that council; on April 7, 1910, the committee considered the charges against Zion Council No. 951, and against the members of that council; and on April 8, 1910, the committee went to St. Paul and considered the charges against the members of a council located in that city. As a result of these hearings, the national executive committee dissolved both Zion Council and Herzel Council and forfeited their charters; the committee also expelled, or attempted to expel, a large number of the members of each of these councils. The following cases in this court have grown out of such action on the part of the committee. *Marcus v. National Council of Knights and Ladies of Security*, 123 Minn. 145, 143 N. W. 265; *Kulberg v. National Council of Knights and Ladies of Security*, 124 Minn. 437, 145 N. W. 120; *Marcus v. National Council of Knights and Ladies of Security*, 127 Minn. 196, 149 N. W. 197.

In the case first cited, it was held, upon the facts shown by the record therein, that the expulsion was valid and effective; in the

case next cited, it was held, upon the different state of facts shown in that case, that whether the assured had been afforded such a trial as the laws of the order contemplated was a question for the jury, and that the attempted expulsion was void and of no effect; in the case last cited, although notice of expulsion had been given the assured, no attempt was made to prove that she had in fact been expelled.

The above cases explain sufficiently the nature and purpose of the society and the manner in which it was conducted. They also determine that the charges made against the accused members were sufficient, if established, to justify their expulsion. They also determine that the procedure provided by the laws of the order for the trial of members accused of such offenses was proper, sufficient and valid; and that where a trial before the national executive committee, regular and lawful when measured by such laws, resulted in the expulsion of a member, such member must appeal therefrom to the national council or the decision of the committee will become final and conclusive. It is undisputed that Mariem Rigler was given due notice of the trial and of the charges against her; that the committee met at the time and place designated; that she appeared and was heard before the committee; that the committee rendered a formal judgment expelling her from the order and canceling her benefit certificate and gave her due notice thereof; and that she never appealed therefrom.

No appeal having been taken from the judgment of expulsion, it can be attacked in this action only upon the ground that it is void. If it is void, it is a nullity and may be disregarded. If it is not void, it conclusively determines that Mariem Rigler was expelled from the order.

Plaintiff's attack upon the validity of the judgment is based upon the following assertions: That Mariem Rigler was not afforded a fair opportunity to make her defense; that there was no evidence tending to prove the truth of the charges against her; and that the proceeding was instituted and conducted in bad faith for the purpose of wrongfully ousting the accused members.

The hall where the hearings were held consisted of a large room

with a smaller room adjoining it and a door between them. The crowd gathered in the large room, and the committee held its sessions in the smaller room. As the several cases were taken up, the name of the accused was called at the door between the two rooms. If he appeared, he entered the room where the committee were in session, was questioned, then retired, and another was called. While there is some dispute as to just what occurred before the committee, the officials insisting that each member called before them was asked whether he had anything further to present and others contradicting this, there is no evidence that any accused member was denied the privilege of presenting any evidence he desired, or of having any person he wished appear for him. Both Mariem Rigler and her husband appeared before the committee. Whether they came in together or separately is not entirely clear. She was nearly blind and was apparently conducted into the room by some one. She produced no witnesses, designated no one to represent her, and tendered no evidence other than the answers she made to the questions propounded to her. The only request that she is claimed to have made was that she be given time to procure a birth certificate from Roumania, her native country. The witnesses for defendant deny that any such request was made and, although her testimony was taken by a reporter in shorthand, no such request appears therein. But if it were made and denied, the refusal of such a continuance would not affect the validity of the proceedings.

In the Kulberg case an unfavorable inference was drawn from the failure of defendant to produce the transcript of the testimony taken before the committee, and the decision of the committee was apparently based in part upon evidence taken in the absence of the accused and at a time and place of which he had no notice. In the instant case the transcript of the testimony taken before the committee was produced at the trial for such use as plaintiffs chose to make of it, and defendant showed affirmatively that all the evidence before the committee was submitted while the accused was present. Plaintiffs offered the transcript in evidence. It consists of 28 questions and answers, some of which contradict, in unimportant particulars, some of the statements contained in the original application

for insurance. The books of Zion Council were also put in evidence before the committee.

The decisions are conflicting as to the extent to which courts may examine the evidence submitted to such tribunals for the purpose of determining the validity of the judgments rendered by them. The New York court in a *mandamus* proceeding involving the expulsion of a member of the New York Produce Exchange said:

"The question for the court is not whether, passing upon the evidence as *res nova*, it would have reached the same conclusion as that of the board of managers, or whether the conclusion was reasonable or unreasonable, but simply and wholly whether the case was so bare of evidence to sustain the decision that no honest mind could reach the conclusion that the relator's conduct was 'inconsistent with just and equitable principles of trade.'" *People v. New York Produce Exchange*, 149 N. Y. 401, at page 414, 44 N. E. 84. In this case the accused member had no right of appeal to a higher tribunal within the association.

The courts generally hold, in effect, that where the laws of a voluntary association provide for an appeal from one tribunal to another within the association and such appeal was not taken, the courts will make no examination of the evidence presented to the subordinate tribunal of the association, but will merely inquire whether the charge, if established, justified the judgment rendered, and whether such tribunal had acquired jurisdiction and had been given the power to render such judgment. 29 Cyc. 205, and cases there cited; *Marcus v. National Council of Knights and Ladies of Security*, 123 Minn. 145, 143 N. W. 265; *Kulberg v. National Council of Knights and Ladies of Security*, 124 Minn. 437, 145 N. W. 120. The absence of evidence to support the decision may be taken into consideration in determining whether the tribunal acted in bad faith for the purpose of fraudulently ousting the accused member.

In the present case Mariem Rigler appeared before the committee and told them she was then 57 years of age, which accorded with the statement in her application for the benefit certificate. She also

told them that she had eight children and that the oldest was 42 years of age. She also stated that she was married at fourteen and had five children before she was twenty. As said in the Marcus case, her "very appearance may have been the most convincing testimony" that she had misrepresented her age or the state of her health. The record does not disclose what, if any, information was contained in the books of Zion Council offered in evidence before the committee. We cannot say that the evidence wholly fails to sustain the decision of the committee.

The claim that the assured was not afforded a fair opportunity to make her defense is apparently based upon the fact that the door between the large room and the room occupied by the committee was kept closed, and the statement of the witness Juster, that he asked the president of the society, before the hearing began, whether he could go in and hear the proceedings, and was told that only members would be admitted. There is no evidence that any accused member was in any wise hindered or prevented from adducing any evidence that he desired, or from having any one present to assist him that he wished.

A careful consideration of the entire record leads to the conclusion that there is no evidence which will justify a finding that Mariem Rigler was deprived of a fair opportunity to make her defense. Neither will the record justify a finding that there was no evidence to sustain the decision of the national executive committee, nor a finding that the proceedings before that committee were instituted or conducted in bad faith. The case falls within the rule applied in the first Marcus case and plaintiffs are not entitled to recover.

The order appealed from is reversed with directions to enter judgment for defendant notwithstanding the verdict.

AUGUSTUS KIRBY BARNUM v. WILLIAM G. WHITE and  
Another.<sup>1</sup>

December 24, 1914.

Nos. 18,911—(141).

**Contract — construction — reformation.**

Plaintiff deeded certain lots to one of defendants. By contract between the parties, defendants agreed to take necessary action to convert the lots into cash, to conduct all necessary suits, to pay all cost and expense thereof, and when the same or any part thereof should be sold, to divide the proceeds. The contract also provided that defendants should advance and pay plaintiff certain amounts and that "all sums advanced and paid" thereunder should be deducted from plaintiff's share. *Held:*

(1) The amount paid by defendants for cost and expense of litigation cannot be deducted from plaintiff's share.

(2) A written contract may be reformed where there has been an actual agreement upon terms, and the writing fails to express those terms, because of mutual mistake, or mistake on one side and fraud or inequitable conduct on the other. To justify the court in reforming a written contract on oral testimony, the proof must be clear, unequivocal and convincing; more than a mere preponderance of evidence is required. This is especially true in a case where an attorney asks for the reformation of a contract written by himself and where the other party stands in a relation akin to that of client. Applying these rules, the finding of the trial court that this contract represented the agreement of the parties, cannot be disturbed.

(3) A contract may be reformed where the parties used the words they intended to use, but through mistake these words do not express the meaning they intended to convey. The evidence does not establish a case of reformation within this rule.

(4) Plaintiff is entitled to receive his share of the proceeds of each tract upon consummation of the sale of such tract, less any deductions accrued at that time.

(5) If defendants have any offset, it is for them to plead and prove it.

<sup>1</sup> Reported in 150 N. W. 227.

---

Note.—The question of the admissibility of parol evidence to vary the terms of a written contract, generally, is discussed in a note in 17 L.R.A. 273.

It is not necessary for plaintiff to prosecute an equitable accounting to ascertain whether defendants have such offset.

(6) There is evidence that defendants paid some taxes on these lots. The contract did not require defendants to pay taxes, but since there is no evidence as to the amount of taxes paid or as to the circumstances of their payment, the court cannot further determine the rights of the parties with reference thereto.

(7) The provision in the contract for division of the "proceeds" of sales does not require that there be deducted from plaintiff's share any expense which the contract by its other terms required defendants to pay.

Action in the district court for Ramsey county for an accounting under a contract and for one-half of the amount received by defendants upon the sale of certain land. The case was tried before Dickson, J., who made findings and ordered judgment in favor of plaintiff for \$2,050. From an order denying defendants' motion for a new trial, they appealed. Affirmed.

*Thomas D. O'Brien*, for appellant Soucheray.

*William G. White*, pro se.

*John F. Fitzpatrick*, for respondent.

HALLAM, J.

Plaintiff, apparently believing himself entitled to some interest in certain lots and in certain vacated streets and alleys in St. Paul, conveyed the same to defendant White, an attorney at law, and at the same time made a contract with said White and defendant Soucheray, which contract contained provisions in substance as follows: First, defendants agreed to take all necessary action to sell and convert said real estate into cash, and to that end that they would "institute and carry forward all necessary suits or proceedings \* \* \* and \* \* \* pay all cost and expense thereof." Second, it was agreed "that when said premises or any part or portion thereof should be sold and converted into cash the proceeds thereof" should be divided as follows: "One-half of the proceeds of such sale or sales \* \* \* paid to said Augustus Kirby Barnum and one-half thereof \* \* \* retained and received by said William G. White and Henry C. Soucheray." Third, it was agreed that defendants

should "advance and pay" plaintiff \$75 cash in hand, \$50 when plaintiff should procure an assignment to defendant White of a certain judgment, and \$50 more when he should procure a like assignment of a certain other judgment. It was further agreed that defendants would "advance and pay" to plaintiff "such further and additional amounts as may be mutually agreed upon by the parties hereto," and it was agreed that "all sums advanced and paid hereunder, including said sum of \* \* \* \$175 \* \* \* shall be deducted from the amount to be paid to said Augustus Kirby Barnum upon the sale or sales of the premises and real estate herein described and set forth."

Pursuant to this contract defendants perfected title to one of said tracts, and later sold the same for \$4,500. Plaintiff brings this action to recover half of said amount. The court ordered judgment for plaintiff for the amount demanded, less \$200 which plaintiff admitted had been paid and advanced to him.

In our opinion the decision of the trial court was right. We construe this contract as follows: It required defendants to pay expenses of litigation incident to the performance of the contract. In consideration of such payment and of the services of defendants, they are to receive, on sale of any tract covered by the contract, one-half of the proceeds of the sale, and plaintiff, in consideration of his ownership of the land, is to receive the other half. If the first two clauses above quoted stood alone, there could be no other contention.

It is contended, however, that the provision, "that all sums advanced and paid hereunder \* \* \* shall be deducted from the amount to be paid to said Augustus Kirby Barnum," embraces amounts paid by defendants as costs and expenses of litigation. We do not think the contract can fairly be so construed. This clause refers to those items which the contract requires defendants to "advance and pay." There is nothing in the language of the clause providing for the payment of costs and expenses that indicates that such payment was intended as an advancement to plaintiff. The language is not susceptible of that construction.

2. Defendants contend that the preliminary agreement between

the parties was that these expenses of litigation should be deducted from plaintiff's share of the proceeds of sales, that it was the intention of the parties that the written contract should so provide, and that if this contract does not so provide it should be reformed so as to conform to that intent. A written contract may be reformed where there has been an actual agreement between the parties and their minds have met on the terms which they intended the writing to express, and where the writing in fact fails to express those terms, and such failure was due to mutual mistake, or to mistake on one side and fraud or inequitable conduct on the other. *St. Anthony Falls Water-Power Co. v. Merriman*, 35 Minn. 42, 27 N. W. 199; *Fritz v. Fritz*, 94 Minn. 264, 102 N. W. 705. To justify a court in reforming a written contract upon oral testimony, the essential facts must be proved by evidence that is clear, unequivocal and convincing. Something more than a mere preponderance of evidence is required. *Layman v. Minneapolis Realty Co.* 60 Minn. 136, 62 N. W. 113; *Mikiska v. Mikiska*, 90 Minn. 258, 95 N. W. 910. This contract was drawn by one of the parties now asking its reformation, himself an able and skilful lawyer. It was the embodiment of terms proposed by himself. Plaintiff sustained to him a relation nearly that of client. It may be that reformation of a contract between attorney and client may sometimes be decreed at the suit of the attorney, and even though the contract was reduced to writing by the attorney himself, but, if so, the proof must be even more clear and convincing than in the ordinary case.

The trial court found that the contract did represent the mutual agreement of the parties. The findings of a trial court should not be set aside, unless manifestly and palpably against the weight of the evidence. *Wann v. Northwestern Trust Co.* 120 Minn. 493, 497, 139 N. W. 1061. We are convinced that no case is made by the evidence for the reversal of this finding of the trial court. All of these parties intelligently read and considered the language of this contract. There is no question that the language used was such as defendants themselves intended to use.

3. A contract may doubtless be reformed in a proper case where the parties used the very words intended, but where the words do

not express the meaning they intended to convey, that is, where the mistake is as to the legal meaning and effect of the words used. *Smith v. Jordan*, 13 Minn. 246 (264), 97 Am. Dec. 232; *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688; *Pomeroy*, Eq. Jur. § 845. This we understand to be the basis of defendants' claim. Under the evidence in the case we cannot say that they have clearly established that any mistake as to the meaning of the language used was mutual, and there is no claim of any fraud or inequitable conduct on the part of plaintiff.

4. Defendants contend that the action is prematurely brought; that plaintiff is not entitled to receive any money under the contract until all litigation involving all the land conveyed is determined. The contract does not so provide. On the contrary, it provides in explicit terms that, when "any part or portion" of the lands conveyed shall be sold, the proceeds shall be divided. Under this provision, plaintiff is clearly entitled to receive his share of the proceeds of the sale of each tract upon consummation of the sale of such tract, less any deductions accrued at that time.

5. Defendants are of course entitled to offset any advances made or any proper claim they may have against plaintiff. Defendants seemed to have labored under the impression that it was incumbent on the plaintiff to ascertain the amount of any offsets through an accounting, and that there can be no recovery by plaintiff until an accounting is had. We know of no principle upon which such a contention can be sustained. The contract gave plaintiff the right to one-half the proceeds of a sale when made. If the defendants have any offset, it is for them to plead and prove it, and it is not for the plaintiff to prosecute an equitable accounting to ascertain whether defendants have any such offset. Defendants did not prove any offset which the court could allow. True, defendant White testified that defendants had expended \$1,600 or \$1,700 under the contract, but there is no showing as to the purpose for which the expenditures were made, and it is clear that some of these expenditures were for costs and expenses of litigation, which defendants were not entitled to offset.

6. There is evidence that defendants paid some taxes and assess-

ments upon this property. It is clear the contract did not require them to pay taxes on plaintiff's land. The contract was not one to discharge incumbrances upon real estate. It assumed that plaintiff owned some interest in the real estate, and it contemplated that defendants should put the title to that interest into marketable shape. It imposed no obligation to pay incumbrances, whether in the form of taxes, mortgages or otherwise. We are furnished with no data as to the amount of such taxes or assessments, nor as to the circumstances under which they were paid. We can accordingly only decide that the contract imposed no duty upon defendants to pay them.

7. Defendant Soucheray submits a separate brief. His main contention is that the "proceeds" which were to be divided under the contract were to be the "net proceeds" of the sale, and that this term contemplates the deduction of the expenses mentioned. Whatever may be the meaning of the term "proceeds," as ordinarily used, we are clear that the use of that term could not require that there be deducted from plaintiff's share any expense which the contract by its other terms required defendants to pay.

Order affirmed.

The following opinion was filed on February 27, 1915.

PER CURIAM.

On motion for reargument defendants ask that the case be remanded with direction to the trial court to take an account between the parties in order to determine the amount of any offset which defendants may have to plaintiff's demand. As indicated in the opinion, evidence of such offset might properly have been offered and received. Inasmuch as the case has been closed, such evidence can now be offered only upon a reopening of the case. Defendants may have sufficient grounds upon which to base an application to reopen the case, but such an application should be made in the trial court. This decision is without prejudice to the right of defendants to make such application on remand of the case.

We find no occasion for a rehearing. It appears to us that the

language of the contract is susceptible only of the construction placed upon it in the opinion, and that that construction cannot, accordingly, be either aided or varied by parol evidence.

---

**BRAGG & COMPANY v. A. GOLDSTEIN and Another.<sup>1</sup>**

December 24, 1914.

Nos. 18,929—(146).

**Deceit — conflicting testimony — verdict conclusive.**

1. Action for deceit. Plaintiff's representative, having testified that the alleged misrepresentations were made and relied upon, and the defendants having testified to the contrary, and the dispute having been properly submitted to and determined by the jury, their verdict cannot be disturbed.

**Evidence.**

2. The improper admission in evidence of a letter from a third party to plaintiff was not reversible error for the reason that, in substance, the letter was a mere repetition of uncontradicted evidence received without objection.

**Charge to jury.**

3. The complaint that the charge implied that defendants, by trick or artifice, had prevented plaintiff from discovering the condition of the property is not well founded.

Action in the district court for Hennepin county to recover \$1,105 for deceit in the sale of a carload of berries. The case was tried before Molyneaux, J., and a jury which returned a verdict for \$1,070.95 in favor of plaintiff. From an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial, they appealed. Affirmed.

*Stiles & Devaney*, for appellants.

*Arthur T. Conley and C. H. Rossman*, for respondent.

<sup>1</sup> Reported in 150 N. W. 223.

**TAYLOR, C.**

Plaintiff purchased a carload of strawberries from defendant for shipment to Winnipeg, and brought this suit to recover damages for alleged fraudulent misrepresentations as to the kind, quality and condition of the berries. The trial resulted in a verdict for plaintiff. Defendants, Goldstein and Yaeger, made the usual alternative motion for judgment notwithstanding the verdict, or for a new trial; the motion was denied and they appealed.

They contend: (1) That the verdict is not sustained by the evidence; (2) that the court erred in admitting plaintiff's exhibit "G" in evidence; (3) that the court erred in its charge to the jury.

1. The evidence on the part of plaintiff was sufficient, if believed, to establish the misrepresentations charged, and that the berries were purchased without examination in reliance thereon. The evidence on the part of defendants was sufficient, if believed, to establish that no representations were made, and that plaintiff relied upon its own examination of the berries in making the purchase. The case turned upon whether the testimony of plaintiff's secretary or the testimony of defendants should be believed. The jury resolved the doubt in favor of plaintiff, and, as the question was wholly within their province, we cannot interfere with their conclusion.

2. Plaintiff had an order from Winnipeg for a car of first-class berries, and sent this car to Winnipeg to fill the order. The customer rejected them as unmarketable. The correspondence between plaintiff and its customer, except the last letter from the customer, was received in evidence without objection. This last letter, which characterized in an uncomplimentary manner both the berries and plaintiff's conduct in shipping them to fill the order, and is known as Exhibit "G," was admitted in evidence against defendants' objection. While it should have been excluded, its admission was not reversible error for the reason that, in substance, it was merely a repetition of other uncontradicted evidence received without objection.

3. Defendants do not contend that the charge to the jury stated the law incorrectly, but that it implied the existence of evidence tending to prove that defendants, by trick or artifice, had prevented plaintiff from making a proper examination of the berries, when in

fact there was no such evidence. We fail to find anything in the record or in the charge from which the jury could infer that there was any such question in the case, and consider the statements to which exception is taken more unfavorable to plaintiff than to defendants.

Order affirmed.

---

MINNEAPOLIS, ST. PAUL, ROCHESTER & DUBUQUE  
ELECTRIC TRACTION COMPANY v.  
MARTHA A. GOODSPEED.<sup>1</sup>

December 24, 1914.

No. 18,937—(139).

**Eminent domain — appeal from award — trial in district court.**

1. An appeal to the district court from the award of damages in proceedings for the condemnation of land under the provisions of chapter 41, G. S. 1913, is to be treated, and heard and disposed of in the district court, as an ordinary civil action, and in accordance with the rules of procedure applicable to such action.

**Dismissal of appeal.**

2. Such appeals, at least when limited to the issue of damages, may be dismissed by the appellant, without the consent of the respondent, in the manner and as provided for by section 7825, G. S. 1913.

Appeal to the district court for Hennepin county from an award of commissioners granting Martha A. Goodspeed \$1,800 damages in condemnation proceedings. From an order, Booth, J., confirming the report of the commissioners, petitioner appealed. Affirmed.

*M. H. Boutelle and R. T. Boardman*, for appellant.

*Daniel F. Foley*, for respondent.

<sup>1</sup> Reported 150 N. W. 222.

BROWN, C. J.

Proceedings were duly commenced by appellant railway company, under chapter 41, G. S. 1913, for the condemnation of certain land for right of way purposes. Commissioners were appointed, and they assessed and awarded to respondent, Goodspeed, the sum of \$1,800, as compensation for injury and damage to lands owned by her and taken by the company for the purpose stated. She was dissatisfied with the award and within the time allowed therefor duly appealed to the district court, specifying in the notice of appeal that the ground thereof was inadequate allowance of damages. The cause thereafter was, in conformity with the rules of practice of the Hennepin county district court, placed upon the calendar for trial. Before the cause was reached for trial, and after the expiration of the time for any further appeal from the award of the commissioners, respondent dismissed her appeal by a notice in writing served upon the company and filed with the clerk of the district court. If she was entitled to dismiss, the notice was effectual for that purpose. Thereafter she applied to the court for an order confirming the report and award of the commissioners, and the application was granted. The company appeared in opposition to the application and appealed from the order granting it. The opposition to the application was founded on the claim that respondent had no right to dismiss her appeal without the consent of the company, that the attempted dismissal was ineffectual for any purpose, and that the appeal should be tried and determined as though no notice of dismissal had been given.

The only question presented is the correctness of this contention, and whether in condemnation proceedings the landowner who appeals from the award of damages may voluntarily dismiss his appeal, and accept the damages given him, or whether when such an appeal is taken the proceeding is brought before the court for trial *de novo*, vesting in the respondent to the appeal the right to insist that the issues presented be heard and determined on their merits.

We think, and so hold, that section 7825, G. S. 1913 (section 4195, R. L. 1905), granting to plaintiff in an action the right voluntarily to dismiss his action, applies to and controls the question,

and thereunder respondent's dismissal of her appeal terminated the cause in the district court, notwithstanding the objection of appellant. The dismissal in this case was in compliance with that statute and sufficient for the purpose. That the statute applies seems quite clear. The condemnation statute, under which this proceeding was prosecuted, and under which the appeal was taken provides, in speaking of the appeal, that, "except as herein otherwise provided, the trial shall be conducted and the cause disposed of according to the rules applicable to ordinary civil actions in the district court." It was held in *Witt v. St. Paul & N. P. Ry. Co.* 35 Minn. 404, 29 N. W. 161, that appeals of this character should be treated as actions commenced in the district court; and, further, that the general statutory right of appeal from the district to the supreme court, given in all civil actions, applies to condemnation proceedings. The rule of that case was followed and applied in *King v. Board of Education of City of Minneapolis*, 116 Minn. 433, 133 N. W. 1018. The general statutes upon the subject of change of venue were in effect held applicable to condemnation proceedings, when removed to the district court by appeal, in *Lehmiecke v. St. Paul, S. & T. F. R. Co.* 19 Minn. 406 (464), and the decision there rendered has since been followed and approved. If the appeal in such proceedings is to be treated as an action commenced in the district court, to be "disposed of according to the rules applicable to ordinary civil actions," it would seem logically to follow that all pertinent provisions of the general statutes regulating procedure in the district court apply, and control the rights of the parties. The appellant in such case assumes the position of plaintiff (*Minnesota Valley R. Co. v. Doran*, 17 Minn. 162 [188]) and may under section 4195, R. L. 1905 (section 7825, G. S. 1913), dismiss the appeal without the consent of the respondent therein, at least where the issue is limited to the issue of damages, precisely as the plaintiff may dismiss an ordinary civil action. The appeal in this case was limited by the notice to the question of damages and did not bring up the whole proceeding for hearing *de novo*. That the issue may thus be limited was held in *Minneapolis, St. P. R. & D. Ele. T. Co. v. St. Martin*, 108 Minn. 494, 122 N. W. 452. The condemnation statute author-

izes an appeal by either party, and an appeal by the landowner remains in his control the same as an ordinary civil action. In this case there was no appeal by the railway company.

Order affirmed.

---

H. E. MUNDWILER and Others v. AMOS BENTSON and Others.<sup>1</sup>

December 24, 1914.

Nos. 18,939—(166).

**County ditch—jurisdiction of district court.**

1. In a county ditch proceeding the question of the propriety of diverting the waters of a meandered lake may be determined upon appeal to the district court; but upon such appeal the district court is without jurisdiction to determine the propriety, in any other respect, of the order of the county board establishing the ditch.

**Diversion of water of meandered lake.**

2. Upon the reversal of the order of the county board, because it provided for the draining of a meandered lake not properly subject to drainage, it may proceed with the drainage project except insofar as it affects the meandered lake.

H. E. Mundwiler and others petitioned the county board of Big Stone county for the construction of a certain ditch designated as County Ditch No. 9, and the report of the engineer and viewers thereon was approved by the board. From the order establishing the ditch, Amos Bentson and others appealed to the district court for that county. The appeal was heard by Flaherty, J., who made findings and reversed the order of the county board. Petitioners' motion to amend the findings was denied. From the judgment against the petitioners, entered pursuant to the findings, they appealed. Affirmed.

<sup>1</sup> Reported in 150 N. W. 209.

*F. W. Murphy*, for appellants.  
*Cliff & Purcell*, for respondents.

DIBELL, C.

This is an appeal by the petitioners in a county ditch proceeding from a judgment of the district court of Big Stone county reversing the order of the county commissioners establishing a ditch.

1. The ditch proceeding contemplated the drainage of a meandered lake. Under G. S. 1913, § 5523, the county board is not authorized in drainage proceedings to drain meandered lakes except, in substance, such as are usually shallow, grassy and marshy, or no longer capable of beneficial public use. Certain persons appealed from the order establishing the ditch. The court found that the meandered lake was not such a lake as the county board was authorized to drain. This finding is not attacked.

There may be an appeal to the district court from an order of the county board providing for the drainage of a meandered lake. G. S. 1913, § 5589. The only other orders of the county board in ditch proceedings from which there may be an appeal to the district court are those which determine the amount of benefits, or which determine the amount of damages, or which refuse to establish a ditch. G. S. 1913, § 5534. Upon an appeal, such as that before us, all matters other than those pertaining to the drainage of the meandered lake are without the jurisdiction of the district court. The statute gives the district court jurisdiction of no subject-matter, except the determination of whether the meandered lake is subject to drainage.

2. The reversal of the order of the county board was a determination by the district court that the meandered lake was not subject to drainage in a county ditch proceeding. Upon the reversal the county board was free to continue the drainage proceedings in the way permitted by G. S. 1913, § 5531, or by any other relevant statutory provision, but it was bound by the determination of the court that the waters of the meandered lake could not be diverted.

The trouble in this proceeding has come through faulty procedure. There should have been no attempt by those appealing from the order of the county board to inject into the case any issue other than that

which was triable by the district court, namely, whether under the statute the meandered lake was such a one as could be drained in the ditch proceeding. The findings should have gone no further. The legislature purposely refrained from giving an appeal to the district court, when the county board established a ditch, except on damages and benefits, and the propriety of draining a meandered lake. The county board can now proceed with the drainage project.

Judgment affirmed.

---

## AUGUST BLOCK v. MINNESOTA FARMERS BRICK & TILE COMPANY.<sup>1</sup>

December 24, 1914.

Nos. 18,953—(176).

### Fall from scaffold — liability of defendant.

The defendant was constructing a silo and the plaintiff was working for it on a staging. A timber, which was not defective, broke and the plaintiff was precipitated to the ground and injured. The silo, and the staging used in its construction, were built under the supervision and direction of the defendant's foreman. It is *held*, the accident having occurred prior to the enactment of Laws 1913, c. 316, § 13 (G. S. 1913, § 3874), relative to scaffolds, etc., that the defendant did not owe the plaintiff the absolute duty of seeing that a proper plan of construction of the staging was used, and that, it having furnished sufficient and proper material for the staging, it was not negligent.

<sup>1</sup> Reported in 149 N. W. 954.

---

Note.—As to the liability of the master for the negligence of a coservant in respect to preparation of scaffolds, staging, etc., see note in 54 L.R.A. 142. And upon the master's liability for defects in temporary appliances constructed by the servants themselves, see note in 57 L.R.A. 841.

For the master's nondelegable duties as to defects in scaffolds, platforms, etc., see note in 54 L.R.A. 69, 77.

Action in the district court for Mower county to recover \$35,155 for personal injuries received while in the employ of defendant. The answer denied that defendant was negligent and alleged that the platform from which plaintiff fell was constructed by himself and his fellow workmen, and that it was wholly through his own carelessness and negligence that the accident happened. The case was tried before Kingsley, J., and a jury which returned a verdict in favor of plaintiff for \$2,875. From an order granting defendant's motion for judgment in its favor notwithstanding the verdict, plaintiff appealed. Affirmed.

*Barton & Kay*, for appellant.

*Catherwood & Nicholsen*, for respondent.

PER CURIAM.

This action was brought to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendant. There was a verdict for the plaintiff. The court granted defendant's motion for judgment notwithstanding the verdict. The plaintiff appeals.

The defendant was constructing a silo and its foreman was in charge. In the doing of the work a staging or scaffold was erected. This was done under the supervision of the foreman. Three men were working with him, among them the plaintiff. Four 2x8 up-rights were first placed. To them were nailed 2x6 timbers. Upon the 2x6s were placed 2x4s extending to the walls of the silo. Upon the 2x4s were placed boards. Upon the platform thus made the foreman and the plaintiff stood in building the walls. It also supported the mortar and the brick tile used in the walls. The staging was extended upward as the work progressed, and at the time of the plaintiff's injury was some 30 feet high.

A 2x4 broke and precipitated the plaintiff to the bottom. It was not defective. There was a sufficient number of 2x4s for use. The 2x4 which broke was placed on its 4-inch side. It is claimed that it was the absolute duty of the defendant to adopt a proper plan of construction, that that use was an improper one, and that defendant was negligent in permitting its use. The specific claim is that the

2x4s should have rested on the 2-inch side, or that a greater number of them should have been used.

There was nothing complicated about the construction of the staging. It was erected under the direction of the foreman as the work progressed, by the foreman and men doing the work, for use in doing it. It was not an absolute duty of the master to see that the 2x4s were placed on the narrow side or that a sufficient number were used. If there was personal fault in the foreman in not placing them properly or using a sufficient number, it was a fellow-servant fault. Negligence in the defendant is not shown. The case is more nearly governed by *Gittens v. William Porten Co.* 90 Minn. 512, 97 N. W. 378, than by *Hagerty v. Evans*, 87 Minn. 435, 92 N. W. 399, or *Carlson v. Haglin*, 95 Minn. 347, 104 N. W. 297.

The injury occurred prior to the enactment of Laws 1913, p. 458, c. 316, § 13 (G. S. 1913, § 3874.)

Order affirmed.

---

## FINCH, VAN SLYCK & McCONVILLE v. LE SUEUR COUNTY CO-OPERATIVE COMPANY.<sup>1</sup>

December 24, 1914.

Nos. 19,012—(132).

### Proof of immaterial allegation.

1. Where the creation of a corporation is not a material issue, in a cause of action, it need not be proven even if alleged. Where material and alleged, neither a denial on information and belief nor a general denial is sufficient to raise the issue of incorporation.

<sup>1</sup> Reported in 150 N. W. 226.

---

Note.—Upon the question of denial of incorporation on information and belief, see note in 30 L.R.A.(N.S.) 778.

As to the admissibility of ledgers in evidence, see note in 52 L.R.A. 581.

**Evidence admissible — ledger entries.**

2. The ledger was properly admissible in evidence under the stipulation of the parties, and the entries therein offered sustain the findings of the trial court.

Action in the district court for Le Sueur county to recover \$983.10 for merchandise sold and delivered. The case was tried before Dickson, J., acting for the judge of the Eighth judicial district, who made findings and ordered judgment in favor of plaintiff for \$938.13. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

*Francis J. Hanzel* and *Moonan & Moonan*, for appellant.

*James E. Trask*, for respondent.

HOLT, J.

Plaintiff, a mercantile corporation, sued the defendant corporation for goods sold and delivered. Findings were made for plaintiff, and defendant appeals from the order denying it a new trial.

The defendant during the time in question conducted stores in Webster, Montgomery and Lonsdale in this state. Plaintiff kept the accounts separate for the goods sold and delivered at each place; and in the complaint set up three causes of action, each being for the goods sold and delivered at the particular village. The dates were specified between which the sale and delivery was made for each place, and also what credits were given by cash or merchandise on that account. The defendant offered no evidence. The answer admitted the purchase of goods from plaintiff, averred that all so purchased had been fully paid for, and otherwise denied the sale and delivery, so we may assume that plaintiff was required to prove the balance due above the credits it admitted.

The technical point is raised that there was no proof of plaintiff's alleged incorporation. An immaterial allegation need not be proven simply because made. It was not necessary to allege the incorporation of either plaintiff or defendant. *Holden v. Great Western Ele. Co.* 69 Minn. 527, 72 N. W. 805, 65 Am. St. 585. Furthermore, were this a case where the fact of incorporation became ma-

terial, defendant's denial thereof on information and belief does not raise an issue (section 7774, G. S. 1913; First Nat. Bank of Rock Island v. Loyhed, 28 Minn. 396, 10 N. W. 421), nor would a general denial (Crow River Valley Creamery Co. v. Strande, 104 Minn. 46, 115 N. W. 1038).

The attempt to question the admissibility of plaintiff's ledger entries, or the sufficiency thereof to prove the sale and delivery, we deem foreclosed by this stipulation made between the respective attorneys before the trial, viz:

"Whereas the defendant admits in its answer that the plaintiff sold and delivered to defendant certain goods and merchandise, but does not admit the amount or value thereof; and whereas the plaintiff's book accounts of said transactions consist of duplicates of the original invoices of such goods and merchandise (one of which duplicate invoices were delivered to defendant with the said goods and merchandise) together with ledger entries in a ledger showing upon separate sheets the amount of each invoice and the amount charged therefor: Now, therefore, in order to avoid the trouble and expense of producing, at the trial of the above entitled action, the said duplicate invoices, it is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the offer by said plaintiff at the trial of said action of said ledger entries without the production or offer of any book or books of original entry of said transactions, shall have the same force and effect as though such offer of said ledger entries were accompanied by a proper and competent offer of the book or books of original entry, the defendant hereby intending to waive all objection to the ledger entries on the ground that they are incompetent without the books of original entry, and to make the ledger entries of said transactions competent evidence thereof without any books of original entry."

There was ample testimony to identify the sheets offered in evidence as the ledger account referred to in the stipulation, and, were more required, proper foundation was laid for their reception as plaintiff's ledger into which had been transferred the postings from its books of original entry.

It appears from the original loose leaf ledger sheets which are

in the return that, subsequent to the sale of the goods here in question, other sales were made to defendant, but for such subsequent sales payments were made or credits given in full. Since the complaint contained no allegations in regard to these subsequent sales, defendant, as we understand it, insists that they should be ignored here, but the credits on account thereof should be applied upon the bills sued for, the same being earlier in point of time. Were defendant's contention upheld, injustice would result, for it is plain that taking the accounts from the dates of the first sales alleged to the last and all the credits, the balance would be the same as found by the court; whereas, were the charges on dealings subsequent to the last dates stated in the complaint left out and all credits, whenever received, applied on the causes of action here involved, plaintiff would receive only part of the amount justly due. To avoid such a result an amendment of the complaint might be resorted to. It is, however, not necessary, for defendant has not availed itself of the credits appearing on the ledger. It introduced no proof of payments. Plaintiff refrained from offering the entries in the ledger as to credits, as well as to charges for goods sold subsequent to the last items alleged to have been sold in the complaint. Defendant offered none of the ledger entries in evidence, and we think it is not in position to urge any other payments or credits than those specifically admitted in the complaint.

Plaintiff proved that a letter, found after each charge entry on the ledger in the column headed "Terms," signified when payment should be made therefor, and what interest should be paid after due. It is common knowledge that retailers buy merchandise on certain specified time, agreeing to pay interest under certain terms. Usually the terms and interest are clearly stated in the invoices such as referred to in the above stipulation. We think the court was right in computing interest according to the terms indicated by the ledger sheets. Defendant has not demonstrated any miscalculation in the amount allowed by the court, and we shall not undertake to verify the accuracy of such amount.

Order affirmed.

MINNIE EWERT v. MINNEAPOLIS & ST. LOUIS  
RAILROAD COMPANY and Another.<sup>1</sup>

December 24, 1914.

Nos. 19,022—(162).

**Removal to Federal court.**

1. An order of the district court transferring a cause to the Federal district court, upon petition made and bond filed by a foreign corporation, is not appealable. The appeal is dismissed.

**Striking case from calendar.**

2. There being no cause pending in the state district court after the transfer or removal, an order striking it from the calendar of the court was right, and is affirmed.

Action in the district court for Waseca county by the administratrix of the estate of Walter F. Ewert, deceased, to recover \$7,500 for the death of her intestate. From an order, Childress, J., dated February 14, 1914, accepting the petition and bond for removal of the action to the United States District Court and ordering that it be removed to that court, and from an order entered March 23, 1914, striking the action from the calendar, plaintiff appealed. Affirmed.

*F. E. Clinite and Moonan & Moonan*, for appellant.

*Stringer & Seymour, W. H. Bremner, F. M. Miner and P. McGovern*, for respondents.

HOLT, J.

Plaintiff instituted suit in the district court of Waseca county for the wrongful death of her intestate. The complaint alleged facts showing a cause of action against the Minneapolis & St. Louis Railroad Co. under the Federal Employer's Liability Act, and attempted to state a cause of action against the Chicago, Rock Island & Pacific Railway Co. under the common law and the statutory law of Iowa,

<sup>1</sup> Reported in 150 N. W. 224.

where the accident took place. Within the permitted time the Rock Island Co., a foreign corporation, gave notice that a petition and bond for removal of the action to the district court of the United States for the District of Minnesota, Second Division, would be presented to the district court of Waseca county. The petition and bond so presented were approved on February 13, 1914, and an order made by the court transferring the action to the said Federal court. The files were transmitted, and the cause placed on the calendar of that court. Plaintiff thereafter appeared in the Federal court and moved to strike from the calendar, and also moved to remand to the state court. The first motion was denied, and the second is still pending. Plaintiff also caused the action to be entered on the calendar of the district court of Waseca county for trial at the term beginning March 16, 1914. But it was stricken therefrom on the motion of the Rock Island Co. On July 14, 1914, plaintiff appealed from this order, and also appealed from the order accepting the petition and bond for removal.

The controlling question is whether the action of the district court in surrendering jurisdiction to the Federal court is reviewable on appeal to this court. No provision in our statutes, in terms, gives such appeal. *Chadbourne v. Reed*, 83 Minn. 447, 86 N. W. 415, is relied on as authority for the proposition that an order or action of the district court which puts an end to further steps in that court in a cause properly triable therein is reviewable on appeal. The question there involved was whether the cause had been removed from one state court to another, and this court held that the matter could be determined on appeal because, as stated by the court, the two district courts having equal jurisdiction on both questions of law and fact might "disagree as to the validity of the transfer of the case, and each strike it from its calendar." The reason for the ruling in the *Chadbourne* case does not obtain here. The removal of causes from state to Federal courts is governed entirely by the acts of Congress. "The right to remove is derived from a law of the United States, and whether a case is made for removal is a Federal question." *Railroad Co. v. Koontz*, 104 U. S. 5, 26 L. ed. 643; *Goldey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517.

The final authority upon the construction of these acts is the Supreme Court of the United States. The decisions of that court, as well as the letter and spirit of the removal statutes, indicate clearly, it would seem, that the only appeal from the action of the state court transferring a cause is by motion in the Federal court to remand. This gives a more simple, speedy and complete determination than by appeal in the state courts. We say a more complete adjudication, for the state court has no authority to do more, when presented with a removal petition and bond, than to ascertain whether upon the face of the papers presented there is, as a matter of law, a right of removal. And, of course, this court would be similarly limited on appeal. On a motion to remand the truth of the facts alleged, as well as the question of law mentioned, may be inquired into and determined. Appeals which do not go to the merits of the controversy, and which are unnecessary, should not be read into the law. Such appeals tend to delay justice and increase its cost. Plaintiff loses no rights by the course we adopt, but is rather the gainer. If her motion to remand is granted, her right to remain in the state court can never thereafter be attacked. *Missouri Pac. Ry. Co. v. Fitzgerald*, 160 U. S. 556, 16 Sup. Ct. 389, 40 L. ed. 536; *Tilley v. Cobb*, 56 Minn. 295, 57 N. W. 799; *Smithson v. Chicago Great Western Ry. Co.* 71 Minn. 216, 73 N. W. 853. If it is denied, she can preserve her point and have it decided on final appeal to the Federal Supreme Court. She is exactly in the same position to have this Federal question reviewed as if the state court had refused to transfer the cause and the petitioner had properly preserved its exceptions to the ruling—the final determination of removability could be presented to the court of last resort. Our conclusion is that the removal act of Congress should be so construed that the only appeal which may be had from an order of the state district court transferring the cause to the Federal court is by motion to be made in the latter court to remand.

Another reason why this court should not interfere, when the district court has transferred the cause, is that the Federal court, by the transfer, is vested with jurisdiction, and even though it erroneously refuses to remand and proceeds to judgment, such judg-

ment, while unreversed, is pleadable as a bar in the state court. And further, the Federal court, when it retains a cause transferred to it, possesses the power to restrain the party from proceeding in the state court. *Traction Co. v. Mining Co.* 196 U. S. 239, 25 Sup. Ct. 251, 49 L. ed. 462.

Unless good reason be shown for a practice which makes it possible to keep litigation in one suit in two different courts at the same time, it should not prevail. We are well aware that in a majority of the states the question has been determined contrary to the position we take. *Dickenson v. Heeb Brewing Co.* 73 Iowa, 705, 36 N. W. 651; *Akerly v. Vilas*, 24 Wis. 165, 1 Am. Rep. 166; *Stone v. Sargent*, 129 Mass. 503; *Mecke v. Valletown Mineral Co.* 122 N. C. 790, 29 S. E. 781; *Western Union Tel. Co. v. Griffith*, 104 Ga. 56, 30 S. E. 420; *State v. Mosman*, 231 Mo. 474, 133 S. W. 38, and in others.

We, however, think it more in accord with the Federal act, and with good practice under our statutes, to hold that no appeal lies from an order transferring a cause to the Federal court. There should be no conflict between state and Federal courts. The proper procedure for the state court is thus indicated in *Chesapeake & Ohio Ry. Co. v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. ed. 765: "In order to prevent unseemly conflict of jurisdiction it would seem that the state court in such cases should withhold its further exercise of jurisdiction until the decision of the circuit court of the United States is reviewed in this court. If the Federal jurisdiction is not sustained, the case will be remanded with instructions that it be sent back to the state court as if no removal had been had." Moon on Removal of Causes states in section 177: "Whether there may be an appeal to the supreme or other appellate court of the state from an order of the trial court ordering a removal has been variously decided. By reason of certain amendments to the statutes of the United States, the question has lost nearly all the importance which it once possessed." The author refers to the change making the order remanding a case final and conclusive and the refusal to remand reviewable, so that parties are not now subject to the predicament pictured in *Stone v. Sargent*, *supra*. In *Le Roux v. Bay* Circuit Judge,

46 Mich. 189, 9 N. W. 154, it was sought by *mandamus* to compel the state court to proceed after an order of removal had been made. In denying the writ the court says: "Where a cause has been removed to the United States court, and the party opposed to such removal wishes to have the cause proceed in the state court, he should make a motion in the United States court to have the cause remanded, and if the motion is denied he has a remedy given him by act of Congress whereby the question can be passed upon by the Supreme Court of the United States. And as the question involves the proper construction of an act of Congress it is eminently proper that the remedy there provided should be pursued and not resort to the state court." In *Forncrook Mnfg. Co. v. Barnum Wire & Iron Works*, 54 Mich. 552, 20 N. W. 582, upon a writ of error to review a removal order, the court says: "We incline, however, to leave the plaintiff to a motion in the Federal court, and shall therefore dismiss the writ of error, but without costs." To the effect that an order transferring a cause is not appealable we also cite *Durham v. Southern*, 46 Tex. 182. In *Illius v. New York & N. H. R. Co.* 13 N. Y. 597, under a code substantially like ours in respect to appealable orders, a removal order was held not appealable. The decision as far as we are informed has been adhered to in that state. The court states: "It was claimed, however, on the argument of the motion, that the order transferring the case was wholly inoperative, on the ground that the case was not within the judiciary act above referred to. The circuit court, therefore, it was urged, will acquire no jurisdiction, and hence the action is determined everywhere. To this it may be answered that the United States Circuit Court will either assume jurisdiction of the suit and proceed to judgment, or it will not. If it does, then certainly the action has not yet been determined. If it refuses to do so, then the order complained of will be vacated and the case will proceed in the supreme court (the state trial court). The question of jurisdiction must be decided by the circuit court itself, and however it may decide we cannot see that the suit will not proceed in one court or the other."

Our determination that the order transferring the cause to the

Federal district court is not appealable, forbids a consideration of the right to a removal on the merits.

It also follows that, the cause having been removed and the files transferred, it should not have been placed on the district court calendar of Waseca county for trial, and the court rightfully struck it therefrom.

The appeal from the order transferring the cause is dismissed and the order striking it from the calendar is affirmed.

---

STATE *ex rel.* LYNDON A. SMITH *v.* CITY OF ST. PAUL  
and Others.<sup>1</sup>

December 24, 1914.

Nos. 19,056—(19).

**City of St. Paul—commission charter sustained.**

The Commission Charter of the city of St. Paul, adopted in 1912, sustained as against the contention that, by reason of its educational features, its adoption, solely by the male voters or otherwise, was not authorized by Const. art. 4, § 36, relating to home-rule charters, and that such provisions contravene Const. art. 8, §§ 1, 3, relating to establishment and maintenance of public schools, and, both in themselves and in the manner of their adoption, violate article 7, § 8, enfranchising women in educational matters.

Upon the relation of Lyndon A. Smith, as Attorney General, this court issued its writ directed to the city of St. Paul, Winn Powers, S. A. Farnsworth, O. E. Keller, Henry McColl, Anthony Yoerg, M. N. Goss, J. J. O'Leary and W. C. Handy, to show cause *quo warranto* they claimed to exercise any authority in matters pertaining to schools and libraries in that city. Writ quashed.

*Lyndon A. Smith, Attorney General, Marcus D. Munn, Charles E. Otis, Francis B. Tiffany, W. H. Yardley, John F. Fitzpatrick,*

<sup>1</sup> Reported in 150 N. W. 389.

*Frederick G. Ingersoll, Charles Bechhoefer, William G. Graves and Gustavus Loevinger, for relator.*

*O. H. O'Neill and John W. Bennett, for respondents.*

PHILIP E. BROWN, J.

This is a *quo warranto* proceeding commenced in this court on information of the attorney general, to test the constitutionality of certain provisions of the present Commission Charter of the city of St. Paul, and the individual respondents' right to exercise authority over its public schools and libraries. Respondents moved to quash.

The facts set out in the petition and writ will be accepted as true, and are as follows: The city has been a municipal corporation for more than 50 years. In 1900 it adopted, pursuant to Const. art. 4, § 36, a Home Rule Charter, which in terms included and adopted the provisions of Sp. Laws 1891, p. 268, c. 36, as amended, whereby the city was organized and incorporated as a special school district with the usual statutory powers, to be administered by seven school inspectors appointed by the mayor and authorized to exercise all the powers vested thereby or by any general law in any school district or in the city considered as a separate and independent one; and thereafter the special district thus created was so administered until the city's Commission Charter became effective. Similarly, up to that time, the city's library system, under the Home Rule Charter, was under the control of a board of directors appointed by the mayor, with authority to manage and supervise all public libraries, reading rooms, etc., and all property acquired for such use, and power, subject to other provisions of the charter, to control and expend all moneys received for such purposes. In 1912 the Commission Charter, which contained no provision concerning voting by women, was proposed, by way of an amendment to the Home Rule Charter, by petition of male voters, and was submitted to and adopted by the male electors at an election held for that purpose and at which women were not allowed to vote. This amendment attempted to substitute, in lieu of the special law of 1891, a different plan as to the management and control of public schools and libraries and the affairs of the school district, by placing them in control of the mayor and six

councilmen, one of which latter was to be known as the Commissioner of Education, with the duty and power of establishing, controlling, maintaining and providing for such schools, the public school system, and the general educational interests of the city as a special school district, and of managing and controlling the property of the city used for educational purposes, with like control of its libraries, together with all property set apart for their use or maintenance and the expenditure of moneys in connection therewith. It is claimed that under the last charter women are in effect denied the right to vote for school and library boards, and are ineligible to hold office pertaining to the management of schools and libraries. The amendment became effective, if ever, in June, 1914, and, all the offices held by respondents being thereby made elective, respondent Powers was chosen mayor, Handy comptroller, and the others councilmen, at an election held thereunder. Thereafter they qualified and entered upon the performance of their respective duties, which they have since continued to perform, with Councilman Yoerg acting in the capacity of Commissioner of Education in accordance with the Commission Charter, to which position he was duly appointed by the mayor.

The provisions of the Home Rule Charter concerning the schools and libraries of the municipal school district, relator claims, have not been superseded by those of the Commission Charter relating to the same subjects, and the former and not the latter are in force in these regards. These contentions are based on the proposition that the provisions of the Commission Charter relating to schools and libraries variously violate our Constitution; and thus manifestly the whole controversy turns upon an answer to the question whether there was lawful right in the male electors only, to substitute the plan of controlling St. Paul as a special school district and its libraries, embraced in the Commission Charter, for that established by Sp. Laws 1891, p. 268, c. 36; relator's insistence being that the former violates Const. art. 8, §§ 1, 3; art. 4, § 36; and art. 7, § 8.

1. Sections one and three of article 8 are as follows:

"The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the

legislature to establish a general and uniform system of public schools."

"The legislature shall make such provisions, by taxation or otherwise, as, with the income arising from the school fund, will secure a thorough and efficient system of public schools in each township of the state."

These provisions were not grants of power, this being inherent, but are mandates prescribing the specified duty. Associated Schools of I. D. No. 63 of Hector v. School District No. 83 of Renville County, 122 Minn. 254, 142 N. W. 325, 47 L.R.A.(N.S.) 200. With us maintenance of public schools has always been a matter of state as distinguished from local concern. As has well been said in a recent decision, education "is not a part of the local self government inherent in the township or municipality, except so far as the legislature may choose to make it such. The Constitution has turned the whole subject over to the legislature." Kuhn v. Thompson, 168 Mich. 511, 134 N. W. 722. In order, however, to effectuate the constitutional mandates, quoted above, and in pursuance of a settled public policy, the law-making body has, because itself unable to perform these duties directly, provided for common, independent and special school districts, all of which are usually public corporations; the two former being governed by general laws, and the latter by the special laws creating them, except as these are modified by general laws. The legality of these special districts is settled by a line of decisions commencing with Board of Education of Town of Sauk Centre v. Moore, 17 Minn. 391 (412), wherein it was held that the establishment of such districts by legislative acts did not contravene the uniformity clause of the Constitution. Nor can it be questioned. They are recognized as legal in all the cases about to be cited, and also in State v. Henderson, 97 Minn. 369, 106 N. W. 348, and in Curryer v. Merrill, 25 Minn. 1, 33 Am. Rep. 450, wherein it was claimed that the same rules applicable to ordinary common schools and districts in respect to text books had to be applied to independent and special districts. The court said at page 6:

"The rule of uniformity contemplated by this constitutional provision which the legislature is required to observe, has reference to

the system which it may provide, and not to the district organizations that may be established under it. These may differ in respect to size, grade, corporate powers and franchises, as may seem to the legislature best, under different circumstances and conditions; but the principle of uniformity is not violated, if the system which is adopted is made to have a general and uniform application to the entire state, so that the same grade or class of public schools may be enjoyed by all localities similarly situated, and having the requisite conditions for that particular class or grade."

Several of these special districts are directly identified by statute with municipalities, and are administered in connection with their affairs. One of such was involved in *City of Winona v. School District, No. 82, Winona County*, 40 Minn. 13, 41 N. W. 539. By special law the territory within the corporate limits of the city of Winona was constituted one school district for the regulation and management of its schools, under the direction and control of a board whose members were to be elected at the charter election, two for each ward, and one for the city at large, to constitute the "board of education of the city of Winona." The city council was required to approve and ratify every contract made by the board for the purchase of a school-house site, and the board was required to submit to the city council annually an estimate of the necessary sums to defray the expenses of the schools, which was subject to the latter's approval and defrayed by a tax levy on the city property, to be collected as other city taxes and the money paid into the city treasury. The title to all school property was to be taken in the name of the city, and conveyances were to be made by the city officers. Said Mr. Justice Mitchell, at page 14 [of 40 Minn., 41 N. W. 540, 3 L.R.A. 46, 12 Am. St. 687] after reciting the foregoing:

"These and other provisions of the act which might be referred to, show beyond all doubt that its purpose was to adopt a policy, and not a mere arbitrary geographical line, and that this policy was to establish a uniform school system, not for the territory then happening to be within the city, but for the city, whatever its area might be, whether enlarged or diminished in the future; and that the board of education, although invested with certain limited corporate powers,

should be one of the departments of the city government, much like a board of public works or park commissioners."

In *State v. West Duluth Land Co.* 75 Minn. 456, 78 N. W. 115, the court considered a special act for the formation of the Independent School District of the City of Duluth; the question being whether the act was contrary to Const. art. 4, § 33, subd. 7, as it then existed, prohibiting special laws "for granting corporate powers or privileges, except to cities," that is by acts of incorporation. The court said, at page 469:

"And the legislation was in fact for a city. Chapter 312 simply provided that the city of Duluth should be an independent school district, its board of directors to bear the corporate name of 'The Board of Education of the City of Duluth.' Provision was made for the annual election of members of the board from among the qualified electors of the district, and, as a consequence, of the city; and their duties and powers were prescribed. This entire act could have properly been made a part of the city charter, for under it the schools of the city are nothing but one of its executive departments."

In *Jackson v. Board of Education of City of Minneapolis*, 112 Minn. 167, 127 N. W. 569, the special law establishing Minneapolis as a school district and declaring the Board of Education a corporation, was construed as a part of the city charter; the court saying, at page 171:

"The maintenance of public schools in conformity with the Constitution of the state is one of the public duties imposed upon the various governmental and administrative divisions of the state, and in carrying out that duty it is immaterial whether or not a distinct legal entity is brought into existence for the purpose of securing the performance of the duty."

In *Schroeder v. City of St. Paul*, 115 Minn. 222, 132 N. W. 317, the court, in speaking of the provisions of the Home Rule Charter, said at page 227:

"The central idea of the system seems to be that the board has full authority over the management of the schools, the selection and salaries of the teachers, the care of the property of the district, and the courses of study. It has no power to make contracts, whether

for school sites and buildings or for supplies, and no power to purchase. The council determines each year in advance what the expenditures for school purposes for that year shall be, within limits prescribed by the charter. The board exercises the powers conferred upon the district solely under the common council, except as in the charter otherwise provided."

Under these decisions we think there can be no doubt as to the power of the legislature to vest the management of school affairs in a municipality. Indeed, relator seeks by this proceeding to reinstate such system, which is provided by the Home Rule Charter. We hold that the Commission Charter is not violative of either section 2 or 3 of article 8 of the Constitution.

2. Does the Commission Charter contravene Const. art. 4, § 36? As we have seen no constitutional provision stands in the way of the right of the legislature to place the public schools and libraries of a district coterminous with a municipality, under municipal departmental control; and it remains to be seen whether this article of the Constitution authorized the qualified voters of respondent city to adopt a charter to that effect. The framers of the Commission Charter were confronted with the educational situation already created by Sp. Laws 1891, p. 268, c. 36, incorporated in the Home Rule Charter, according to which the city was a separate and independent school district, vested with all the powers and rights specified in any general law relating to school districts, in all matters pertaining to public schools; such powers, however, being exercisable through a board of seven school inspectors appointive by the mayor, but solely under the legislative department of the city government, and possessing, subject to the city's direction and supervision, all powers and rights theretofore vested in the board of education of the city, except the right and power to be a corporation or as might otherwise be ordained by the city under the provisions of the act. Furthermore, it was provided by the act of 1891 that the board of education should cease to be a corporation after May 15, 1891, and the board of inspectors created thereby should, "as the head of an executive branch of the government of the city of St. Paul, execute all the powers vested by this act or by the general laws of the state in any

school district or in the city of St. Paul as a separate and independent school district, and no other powers." The effect of the special act and the Home Rule Charter, therefore, was to merge the school district in the municipality, with the same territorial boundaries, and the specific question for determination is: Did the city have the right, under its Commission Charter framed and adopted under article 4, section 36, and related statutes, to retain the educational department already established by the legislature? This article is too long to quote; but it empowers cities and villages to frame charters for their own government "consistent with and subject to the laws of this state;" provides for submission thereof to the electors for ratification, and that before any city shall incorporate thereunder the legislature shall prescribe by law the general limits within which the charter shall be framed, which, however, must always be "in harmony with and subject to the Constitution and laws of the state;" and in order that legislative control may not be wholly lost by a prospective charter, power is specifically saved to the legislature to "provide general laws relating to affairs of cities \* \* \* which \* \* \* shall be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for." Manifestly the purpose of article 4 was to give cities the maximum freedom of self-government consistent with the general welfare of the state (*State v. City of Mankato*, 117 Minn. 458, 136 N. W. 264, 41 L.R.A.[N.S.] 111), and the occasion for and conditions leading to its adoption are well stated in *State v. O'Connor*, 81 Minn. 79, 83 N. W. 498, the present Chief Justice saying at pages 83, 84:

"By a constitutional amendment in 1891, special legislation as to cities and villages was wholly prohibited. Thereafter all incorporated cities and villages were limited in the conduct and management of municipal affairs to the power and authority theretofore contained in and conferred by their charters, to which no amendments or additions could be made. The result of this was to hamper and embarrass such cities and villages in the conduct of their affairs. Exigencies and new conditions arose, which demanded and required the exercise of greater power than was conferred upon them; but the legislature was powerless to act, except perhaps by general legisla-

tion, which was impracticable, because of the varied interests, duties and responsibilities of different cities. The Constitution prohibited granting any further privileges to such cities, and as a consequence the administration of public affairs thus became very much embarrassed and involved. To obviate all these difficulties, and to place such cities on a broader basis, and in a position prepared to meet and deal with new conditions sure to follow their advancement and growth, it was deemed wise and advisable to authorize them to frame and adopt their own charters."

So far as concerns matters other than those relating to schools, our attention has not been called to any provision of the Commission Charter violative of G. S. 1913, §§ 1354, et seq., these being the statutory authorization for the commission form of government, and relator's contentions in this regard are not sustained. But if the charter contains any provisions relative to schools and educational matters out of harmony with the Constitution and general laws, they cannot be sustained. Likewise, if the powers and duties therein prescribed as to education trench upon the system provided by the legislature for the state, it would be inoperative, because the Constitution renders the charter subject to the limitations involved in the operation of general laws. Merely transferring control from a board of seven inspectors to the city commissioners cannot be considered as contrary to the Constitution; for it is the system, and not the officering, of schools, that constitutes the matter of constitutional concern, as is established, we think, by the authorities already cited. Is there, then, anything in the Commission Charter inconsistent with or derogatory to the general policy of the state indicated by our laws and decisions with respect to educational facilities? In addition to the transfer of the general control of the schools and libraries of the city "as a special school district," from the school inspectors under the Home Rule Charter and the act of 1891, to the mayor and commissioners under the Commission Charter, the latter provides for their establishment, maintenance and management with a thoroughness of plan and completeness of detail that conclusively negatives any suggestion of impairment or insufficiency; special and careful provision being made for appointment of superintendent of schools, librarian,

teachers and assistants, school and library advisory boards, administrative rules and regulations, scholarship, courses, books, attendance, finances and acquisition and control of property. Indeed, neither the petition nor the writ suggests that inefficiency or inadequacy or diminution of the standard of the schools has or will be entailed by the change of administrative system, and there is no allegation to the effect that the constitutional requirement of "a thorough and efficient system of public schools" will not be complied with, or that the schools as now or hereafter to be administered will afford less educational facilities than those possessed by any district in the state. Furthermore, G. S. 1913, § 1345, enacted pursuant to the constitutional mandate for legislative limitations as to the frame of the charter, after setting out general directions as to its contents, provides:

"Subject to the limitations in this chapter provided, it may provide for any scheme of municipal government not inconsistent with the Constitution, and may provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal functions, as fully as the legislature might have done before the adoption of sec. 33, art. 4, of the Constitution. It may omit provisions in reference to any department contained in special laws then operative in said city or village, and provide that such laws, or parts thereof as are specified, shall continue in force therein."

And section 2754, relating to boards of education in cities with more than 50,000 inhabitants, exempts therefrom cities acting under home rule charters.

In short, the legislature, in the first instance, commingled the school district with the municipality. The framers of the Commission Charter accepted this situation as they found it; but they were not required to leave so important a matter as education untouched for all time nor in the same administrative form as previously. Beyond doubt the legislature could have effected the change made, and the people of the district, being the same as those of the city, were vested with like power. *State v. City of Mankato*, supra. Both the fundamental and statutory law gave them this right, and having

exercised it their will must stand, unless there is some reason to the contrary not yet considered; for no predicate has thus far been shown for persuasive constitutional objection, nor any reasonable basis for suggestion that the administrative scheme adopted involves increased danger of political manipulation. In any event, mere undesirability of the plan established is for the consideration of the legislature, and not of the courts.

3. Constitution, art. 4, § 36, was adopted in 1896 and amended in minor regards in 1898. It provides for the submission of a proposed charter to the "qualified voters" of the city or village for which it is intended. Article 7, section 8, was ratified in 1898. It reads as follows:

"Women may vote for school officers and members of library boards, and shall be eligible to hold any office pertaining to the management of schools or libraries. Any woman of the age of twenty-one years and upwards and possessing qualifications requisite to a male voter, may vote at any election held for the purpose of choosing any officers of schools or any members of library boards, or upon any measure relating to schools or libraries, and shall be eligible to hold any office pertaining to the management of schools and libraries."

Are the provisions of the Commission Charter in question invalid, because women were not granted the right to vote on them, and thereunder can neither vote for the city officers to whom the general administration of the school and library affairs of the municipal district is committed, nor themselves hold such offices? This is the ultimate question depending upon the effect of these provisions of the Constitution; but at its threshold stands another proper to be considered as bearing upon the construction to be given them, namely: Had the educational features of the act of 1891 been incorporated bodily into the Commission Charter, instead of the provisions chosen, would women have had the constitutional right to vote on its adoption or hold elective offices in anywise relating to schools and libraries thereunder? True, relator insists that this question is not here material because not in issue, but it cannot be thus summarily disposed of by mere assertion. As has been shown, at the time of the adoption of both sections the legislature had for years commingled

school and municipal affairs, and women have never been considered as within the term "qualified voters," as used in section 36, article 4 (Oppegaard v. Board of Commrs. of Renville County, 120 Minn. 443, 139 N. W. 949); for section 8, article 7, while self executing, extended the right of suffrage and eligibility to office only within the limitations therein expressly declared. In considering these provisions our fundamental law, no less than the Federal Constitution (see Prout v. Starr, 188 U. S. 537, 543-544, 23 Sup. Ct. 398, 47 L. ed. 584), must be regarded as one instrument, all the provisions of which are to be deemed of equal validity, accorded equal effect, and interpreted so that each and all of them will be respected and observed. As said by Chief Justice Start in State v. Stearns, 72 Minn. 200, 211, 75 N. W. 210:

"The several provisions of the Constitution \* \* \* must be construed together, as a whole, and with reference to the purposes for which the Constitution was ordained. It is not permissible to select a single, isolated provision, and give it effect according to its literal reading, without reference to modifications made by the express language of other provisions of the instrument."

We think it would not be contended that the people, by the suffrage amendment, intended to overturn all existing conditions, nor that, if the framers of the Commission Charter had chosen to follow the former charter as to educational matters, women would have had the right to vote for or hold any elective office thereby provided for. Section 8, when fairly construed, means that women shall have the right to vote for elective school officers and members of library boards as such, and are eligible to hold such offices. It expressly provides that they may vote at any election "*held for the purpose of choosing* any officers of schools or any members of library boards, or upon any measure relating to schools or libraries, and shall be eligible to hold any office pertaining to the management of schools and libraries." Certainly, if the intention had been to extend the rights claimed by relator to all matters involving schools and libraries, different language would have been chosen, and at least some effort made to harmonize the provision with other constitutional limitations; for obviously the adoption of any charter sufficiently compre-

hensive to cover the needs of a municipality would otherwise be impossible. Hence we do not think there is foundation for the position that women have the right to vote for officers of municipalities, merely because their functions pertain in some degree to educational matters. No greater departure from established ideas has heretofore been suggested than that no elective officer in this state whose duties touch the domain of education can be validly chosen without according women the right to vote for him. Yet relator's argument, followed to logical conclusion, leads to that result, which, furthermore, would require readjustment of the entire electoral system of the state, if, indeed, any plan could be devised which would effectuate the suffrage amendment as thus extended, and at the same time keep within the bounds of other provisions of the Constitution. If relator's contention is sustained, it inevitably follows that after the ratification of article 7, § 8, and before the Commission Charter went into effect, women had the right to vote for mayor, for he was the appointive head of the schools—a position so manifestly unconstitutional, when we remember that women are not and have never been "qualified voters" generally, as to require no discussion.

Under the present charter, as for many years heretofore, the general school officers and members of library boards in the municipal school district have been appointive, as distinguished from elective, and women now have the same rights as ever in these capacities. Their status in relation thereto is the same under the new as under the old system, and they have neither gained nor lost any legal right. The substitution of the one system for the other without changing or taking away any prior legal right cannot be held violative of our fundamental law.

We hold that women were deprived of no constitutional right when refused the privilege of voting on the adoption of the Commission Charter; that the instrument is valid; that they have no right to vote for mayor because he is vested with power to appoint the commissioner of education, nor for members of the city council because to them is committed the general control of educational matters as constituting one of the departments of the municipal government.

Writ quashed.

GENEVA KIMBALL v. CITY OF ST. PAUL and Another.<sup>1</sup>

December 31, 1914.

Nos. 18,908—(150).

**Defect in street — charge to jury — notice to city.**

Second street in the city of St. Paul extends along the brow of the bluff fronting the Mississippi river. Defendant railway company had dug away the face of the bluff up to, or nearly up to, the curb on the south side of the street, and defendant city had full knowledge thereof. A heavy truck driven by plaintiff's intestate backed against the curb, which gave way and precipitated the truck and driver to the bottom of the bluff, killing the driver. *Held*: That the curb was a part of the street; that whether the support of the curbing had been so weakened as to create a dangerous defect in the street was a question for the jury; that an instruction to return the same verdict as to both defendants was correct; that the verdict is sustained by the evidence; and that no errors appear in the record.

Action in the district court for Ramsey county by the administratrix of the estate of Cyrus Kimball, deceased, to recover \$7,500 for the death of her intestate. The case was tried before Dickson, J., who when plaintiff rested denied separate motions of defendants to dismiss the action, and a jury which returned a verdict for the amount demanded. From the judgment entered pursuant to the verdict, defendants appealed. Affirmed.

*O. H. O'Neill, John A. Burns and W. J. Giberson*, for City of St. Paul.

*George W. Peterson and James B. Sheean*, for Chicago, St. Paul, M. & O. Ry. Co.

*Frank Haskell*, for respondent.

TAYLOR, C.

Second street in the city of St. Paul extends in an easterly and westerly direction along the brow of the bluff which faces the Mis-

<sup>1</sup> Reported in 150 N. W. 379.

Mississippi river. Minnesota street is one of the intersecting streets which extends northwardly from Second street. Both streets are paved and bear a large amount of traffic. Second street is paved with sandstone blocks laid upon a concrete foundation, and is curbed with granite curbing extending five or six inches above the paving. The bluff is composed of a soft sandrock and descends abruptly for about 60 feet. The curbing along the top of the bluff on the south side of Second street was set in a shallow trench in this sandrock. Defendant railway company owns the land abutting Second street on the south, including the face of the bluff and the land at its base. In 1892, the company dug away and removed a considerable portion of the base and front of the bluff, and constructed freight yards and a freight depot at its foot. They cut the top of the bluff to within about five feet of the curb line on Second street. Since that time the elements have disintegrated the sandrock, of which the face of the bluff is composed, to such an extent that portions of it have necessarily been removed, from time to time, to prevent it from falling and injuring persons at work in, or having business at, the freight yards. For this reason the top of the bluff had been cut away by the railway company until, at the time of the accident, the edge or brink of the bluff, at the place of the accident, was within a few inches of the curb on the south side of Second street. From this point the face of the bluff sloped downward at an angle of about 45 degrees. In September or October, 1912, the railway company built a fence along the curb on the south side of Second street about three feet and six inches high above the curb. Posts seven feet in length and about eight feet apart were set in the sandrock outside of and against the curbing and were clamped to the curbing. A cap-timber four inches thick and six inches wide was nailed upon the top of the posts, and two planks or boards were nailed between the cap-timber and the curb. In addition to the undisputed facts above recited, there was also testimony tending to prove that the sandrock, outside of and underneath the curbing, had become eroded, or been removed, to such an extent that there was an open space of some two inches between the outer edge of the bottom of the curbing and the sandrock upon which it rested.

Plaintiff's husband, Cyrus Kimball, was a teamster driving a two-horse truck for the Crescent Creamery Company. On the morning of June 8, 1913, he started from the loading platform of the creamery company's building on Minnesota street, near Second street, with a load which, including the truck, weighed slightly over three tons. There was no brake upon the truck. He proceeded along Minnesota street to Second street, turned west up Second street, and proceeded up a grade upon that street for a distance of 25 or 30 feet beyond the west line of Minnesota street when his team stopped. Why they stopped is not disclosed with any certainty. A moment later the truck, turning somewhat, backed against the curb and fence, hereinbefore described, which gave way, and the truck, team and driver were precipitated to the bottom of the bluff, a fall of about 60 feet. Mr. Kimball was killed, and plaintiff, as administratrix of his estate, brought this suit for damages against both the city and the railway company. She recovered judgment against both in the district court, and both appealed therefrom.

The complaint alleged, in substance, that the railway company negligently excavated a portion of the cliff wall, and caused the same to be weakened to such an extent that it was dangerous for teams to pass over Second street; that defendants negligently constructed a guard railing along the southerly side of Second street without proper foundation, and resting upon sandrock that was flush with the top or edge of the bluff, and without proper braces or supports to prevent the guard railing from falling over the bluff when pressure was applied upon Second street at the place of the accident; that the city negligently constructed Second street too close to the edge of the bluff for the same to sustain the weight of traffic without great danger to the drivers of vehicles traveling thereon; and that defendants negligently failed to inspect and ascertain the condition of said street and to keep it in proper condition for the public to travel safely.

The court submitted the case to the jury in a very clear and accurate charge, in which he carefully defined the rights and duties of both defendants, and the facts which must appear in order to

charge them with liability for negligence. Among other things, he said:

"There is no duty resting upon either of the defendants to build a fence which in and of itself would be strong enough to withstand the force of a load of this kind backing up against it with force as this load is shown to have done. The degree of care required of either of the defendants is not so great as to require a fence that would absolutely stop a load of that kind when backed with violence against it; nor does the city provide curbs for the purpose of brakes or for the purpose of stopping a wagon which is being backed up. The curb is not designed or prepared for that purpose, and the city is not obliged to prepare a fence or a curb that would be strong enough to withstand the force of a load of this kind backing down against it, and the only question, as I have said before, is whether or not the lateral support, the side support of this street, had been so weakened through the operations and excavations of the defendant company here, that some portion of the street upon which a traveler had a right to rely as being safe and reasonably substantial gave way and went down, and for that reason precipitated Mr. Kimball over the cliff. That is the real question in the case.

"If you are unable to find a fair preponderance of the evidence that any usable portion of this street, any portion of it which a traveler had a right to rely upon as being reasonably safe, was weakened and caused to give way on account of the manner in which the Omaha Railroad Company excavated this cliff—I say, if you are unable to find that from a fair preponderance of the evidence, your verdict will have to be in favor of both of the defendants in this case. But if, from a fair preponderance of the evidence, you are able to find that by reason of the manner in which this cliff was excavated, some portion of the street upon which a traveler had a right to rely as being reasonably safe, was weakened and caused to give way, and on account of that Mr. Kimball was precipitated over the precipice and was killed, and also find that he was in no manner guilty of a failure to use ordinary care for his own safety under the circumstances at that time, then you will be obliged to return a verdict in favor of the plaintiff."

Defendants insist that no cause of action was established, for the reason that the roadway and paving not only supported the load but remained intact after the accident, and that only the curbing and fence gave way. But we think that the curbing was a part of the street, and that the facts and circumstances, shown by the evidence, were such as to require the submission to the jury of the question whether the railway company had negligently so weakened the support of the curbing that it created a dangerous defect in the street. The case was carefully and fairly submitted to the jury upon this theory, and under instructions which are unchallenged; and the evidence is sufficient to sustain the verdict.

The court also charged the jury that their verdict should either be in favor of both defendants, or against both defendants. The cutting away of the bluff had been done by the railway company, but the city had full knowledge of the situation, and, under the evidence in this case, such an instruction was proper. *Fortmeyer v. National Biscuit Co.* 116 Minn. 158, 133 N. W. 461, 37 L.R.A.(N.S.) 569.

The instructions tendered by defendants, so far as correct, were sufficiently covered by the general charge.

No errors appearing, the judgment appealed from is affirmed.

---

## EUNICE L. BUTLER v. WALTER L. BADGER and Others.<sup>1</sup>

December 31, 1914.

Nos. 18,912, 18,770—(145, 39).

**Trust deed — undue influence — interference of courts.**

Plaintiff executed to defendant a deed of certain property in trust for the uses and purposes therein expressed; the main object and purpose of the trust was to relieve plaintiff, then well along in years, and in failing

<sup>1</sup> Reported in 150 N. W. 233.

---

Note.—Upon the question of undue influence as a ground for relief from a voluntary trust, see note in 19 L.R.A. 767.

health, of the burden of managing the property, and to preserve it for her heirs, to be distributed to them in equal shares at her death. Two years thereafter, through guardians duly appointed by the probate court, plaintiff brought this action to set the trust deed aside, on the ground that she was mentally incompetent and incapable of understanding the transaction, and that the deed was obtained by undue influence.

(1) It is *held* that the evidence supports the findings of the trial court that plaintiff was competent to enter into the transaction, that she fully understood the same, and that the deed was not obtained by undue influence.

(2) The absence of a clause reserving in plaintiff the power of revocation did not invalidate the deed. The absence of such a provision was an item of evidence or circumstance bearing upon the issue whether the deed was the deliberate act of plaintiff, and of her mental capacity to enter into the agreement.

(3) A further clause relieving the trustee from interference by the courts in respect to the ordinary management of the affairs of the trust, has reference to mere details, and was not intended to exempt the trustee from the control of the court in respect to substantial transactions.

(4) An order granting leave to the trustee to mortgage a part of the property for the purpose of raising funds to pay claims, and the order of the court making such mortgage take precedence of plaintiff's notice of *lis pendens*, *held* authorized by the application therefor.

Action in the district court for Hennepin county by the guardians of Eunice L. Butler to set aside a certain trust deed and for an accounting. The case was tried before Steele, J., who made findings that plaintiff was not entitled to any relief. From the judgment entered pursuant to the order for judgment and from an order vacating a *lis pendens*, plaintiff appealed. Affirmed.

*Patterson, Loring & Anderson and J. M. Pulliam*, for appellant.

*James D. Shearer, L. B. Byard, Ell Torrence and Henry Deutsch*, for respondents.

BROWN, C. J.

H. C. Butler, for many years a resident of Minneapolis, died in 1896, leaving a considerable property. He left surviving him plaintiff, his widow, and four grown children, one son and three daughters. The property involved in this action passed directly to the widow from decedent, and she has since owned and controlled the same.

It consists of both productive and nonproductive real estate situated in Minneapolis, where the widow has at all times resided since the death of her husband, and is of the value of about \$60,000. She managed the property from the death of her husband with the assistance of some of her children, and real estate dealers, until September, 1910, when she conveyed all the real estate to defendant for the uses and purposes expressed in the deed of conveyance, and transferred to him also a certain sum of money then on deposit to her credit in a bank. Defendant accepted the trust and proceeded to carry out the terms and provisions thereof. In October, 1912, some two years after the trust deed was so executed, the probate court upon proper petition duly appointed plaintiff's daughter and one Allison guardians of her person and property, with the usual authority in such cases provided. The guardians so appointed thereafter brought this action to set aside and annul the trust deed, on the grounds that plaintiff at the time it was executed was mentally incompetent to enter into the transaction, and that the deed was procured by means of undue influence. The cause was tried without a jury, and upon findings fully detailing the facts the court directed the entry of judgment for defendant, thus in all things affirming the validity of the deed, declaring the competency of plaintiff, and negating the claim of undue influence. Judgment was entered accordingly and plaintiff appealed.

The assignments of error challenge the findings of fact insofar as plaintiff was found by the court to have been competent to enter into the trust agreement, and upon the subject of undue influence, and also certain rulings upon the admission and exclusion of evidence.

The assignments in reference to the admission and exclusion of evidence do not call for discussion. We have examined the same and discover no errors of a character to justify a new trial. Plaintiff was given considerable latitude in the introduction of her evidence, and that excluded, if not fully covered in a general way by other evidence, was not such as to require a retrial of the action.

We come then to the main question whether the evidence reasonably supports the findings.

At the time the deed was executed plaintiff was 78 years of age, and

undoubtedly incapable of managing properly her large property interests. Not that she was wholly incompetent, or incapable of understanding particular transactions, but her interests taken as a whole were greater than she alone could properly and safely care for. For a number of years prior she had committed the general control thereof to agents, one of whom was defendant Badger, who, for some time immediately preceding the date of the trust deed, had exclusive control of her real estate interests. Prior to that time one of her daughters had obtained from her a lease of valuable property at a rental less than the property was worth, and another daughter, the guardian who brought this action, obtained from her a lease of other property at a nominal rental, the lease extending over a period of 15 years, with an option on the part of the daughter to renew the same for a like period. The third daughter was an invalid residing in California. The son had died prior to the execution of the deed, leaving a widow and children, who would be entitled to his share of the property on the death of plaintiff. It was the desire and wish of plaintiff that the property be preserved for her children, and distributed to them in equal proportions at her death. There had been some differences between the daughters with respect to the property and its disposition. All were satisfied that the mother should be relieved in some way permanently of the burden of managing the property, and several conferences were held with a view to devising plans to that end. The invalid daughter was represented in these negotiations by an attorney, the plaintiff by two or more attorneys, all of whom were of high standing in the profession with no interest to serve save that of their client. It was finally, after considerable discussion and consideration, agreed by all the parties, except the present guardian of plaintiff, that a conveyance of the property to defendant Badger was the most feasible and appropriate method of accomplishing the desired result, namely, relief of plaintiff from the burdens incident to the management of the property; Badger to hold it in trust, or the proceeds thereof in case of sale, to the end that it could be equally distributed among the heirs at the death of plaintiff. The situation and the purpose of the deed were fully explained and laid before

plaintiff by her attorneys, and the evidence indicates that she fully comprehended the transaction. The trust deed was prepared accordingly and properly signed and executed by both parties. By it the property was conveyed to Badger, in trust, for the purposes therein mentioned, and he was thereby clothed with exclusive authority to carry out the intention of the transaction. His duties and obligations are clearly and fully set forth therein, the rights of all of plaintiff's children, and the wife and children of her son, are fully protected, and each equally provided for in the final distribution of the estate. It provided for the payment of \$3,000 per annum to plaintiff for her support and maintenance during life, and the sum of \$25 per month to each daughter, and the widow of the deceased son, with the condition, as to the daughters who hold leases of part of the trust property, that such leases be surrendered and cancelled. And finally, and within three years after the death of plaintiff, that the remainder of the estate be divided equally between those parties. One daughter surrendered her leasehold rights but the other, the present guardian of plaintiff, declined to do so, and the monthly payments have not been made to her. The trustee is clothed with the general care and management of the property, and in respect thereto "shall not be obliged to submit himself to the jurisdiction of any court in the ordinary" affairs thereof. His compensation is fixed at \$300 per year, and the usual broker's commission for sales and rentals. He is required to execute a bond in the sum of \$10,000 conditioned for the proper management of the estate, with provisions for the execution of a larger bond upon demand of the plaintiff, or after her death by a majority of the beneficiaries. The deed contains no power of revocation.

The findings of the trial court set forth the facts in greater detail, but the statement here made is deemed sufficient to a full understanding of the transaction, the validity of which is questioned.

1. The rule guiding us in the determination of the question whether the findings of the trial court are supported by the evidence is too well established to require restatement. Expressed in one form, it is that the findings will not be overturned unless the evidence is clearly and palpably against the conclusion of the trial court. In the light

of this rule we have examined the record, with the result that evidence is found therein reasonably tending to sustain the conclusions of the court below upon both points in controversy, namely, the mental capacity of plaintiff, and the alleged undue influence, and to preclude the view that the evidence is clearly and palpably against the findings.

2. We find no evidence of undue influence on the part of defendant Badger. While it is true that he had for some time prior to the transaction acted as the agent of plaintiff in the management of the property, in entering into the trust agreement plaintiff was represented in all the negotiations by members of her family, and by attorneys employed by her, and whose interest in the matter was solely that of protecting plaintiff. The contract vests in Badger no proprietary interest in the property, there was no overreaching by Badger, and he acquired thereby no undue or other unconscionable advantage or benefit from the transaction. He was simply given the control of the property, with the right and duty of exercising supervision thereof, and this primarily for the purpose of relieving plaintiff from further responsibility in the premises and to avoid, also, further controversy between the daughters concerning the property and its disposition. The transaction accomplished what plaintiff and her advisers thought was for her best interests, and of all those interested in the estate. We are clear that no undue influence was shown. *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885; *Howard v. Farr*, 115 Minn. 86, 131 N. W. 1071.

3. The evidence bearing upon the question of plaintiff's mental capacity took a wide range, covered a period of years preceding the transaction, and brought to light numerous acts, conduct and lapses of memory on plaintiff's part, and matters indicating in a measure a gradual weakening of her mental power. But taken as a whole the evidence did not require a finding that she was wholly incapacitated or incapable of understanding this or any other particular transaction. Her condition of mind did not arise from any organic ailment, but was naturally incident to her declining years. There was no showing of such a hopeless decay or loss of mental faculties as to require a finding of senile *dementia*, and we are not justified in

holding that plaintiff was so afflicted, or in declaring, as a matter of law, that the trial court should have so found. A detailed discussion of the evidence upon this branch of the case would serve no useful purpose. We have examined it with care with the result stated, and therefore pass the question without further comment. The question of burden of proof is unimportant. Whether upon plaintiff or defendant in a case of this kind, it is unnecessary to consider. We hold that the findings are sustained within the rule guiding this court, and that result follows even though the burden of proof lay with defendant.

4. The fact that the trust deed contained no power of revocation is not fatal to its validity. 39 Cyc. 93; *Brown v. Trust Co.* 87 Md. 377, 40 Atl. 256. The absence of such a reservation is a circumstance to be considered in determining whether the transaction was the deliberate act of the parties (*Russell's Appeal*, 75 Pa. St. 269), but it is not an essential to a valid trust of this character. In the case at bar the evidence makes it clear that the parties intended the trust to continue during the life of plaintiff, and this purpose would have failed had the power of revocation been reserved. Nor does the clause found in the deed, by which Badger is relieved from interference by the courts in the management of the ordinary affairs of the trust, render the transaction invalid. If this had been an attempt wholly to exclude the authority of the court to control the conduct of the trustee, and to vest in him arbitrary authority to sell and dispose of the estate in harmony with his own pleasure and without regard to the best interests of the estate, no doubt the trust would, at least, to the extent of such grant of arbitrary power, be declared void. Trusts of this kind are subject to the supervisory control of the courts, even in cases where attempt is made by express stipulation between the parties to avoid judicial interference. 39 Cyc. 315; *Keeler v. Lauer*, 73 Kan. 388, 85 Pac. 541. To what extent this clause in the deed will authorize the trustee to proceed with the trust affairs, without application to the court, is not necessary to determine. That he cannot go beyond the detailed administration of the estate without the approval of the court, or the acquiescence of all interested parties, seems clear. But what transactions or dealings

with the property would go beyond the "ordinary affairs" thereof, we do not stop to consider.

5. Subsequent to the execution of the deed, and after the decision of the court sustaining the trust, the trustee made application to the court for an order permitting him to mortgage a part of the property to obtain funds for the payment of taxes and other expenses of the estate, arising in part from the expense of the litigation and additional payments to plaintiff, required because of an injury suffered by her, necessitating the employment of physicians and nurses to treat and care for her. The application also prayed for the vacation of a *lis pendens* filed in the action by plaintiff at the time the suit was brought. After due hearing the court made an order granting the application and providing therein that the mortgage executed by the trustee should take precedence to rights protected by the *lis pendens*. From this order plaintiff appeals. Since the decision of the court in the main action is sustained, it is unnecessary to consider the questions here presented. That the court had the power to authorize the temporary loan is clear, and as the main action falls the *lis pendens* falls with it, and that puts an end to this appeal. The application justified the order.

Judgment and order affirmed.

---

F. W. MURPHY v. L. A. ANDERSON and Others.<sup>1</sup>

December 31, 1914.

Nos. 18,916—(153).

**Lease—consideration for option to buy.**

1. Where a lease contains an option to purchase the property, the obli-

<sup>1</sup> Reported in 150 N. W. 387.

---

Note.—Upon the question of specific performance of an option contract, see note in 21 L.R.A. 131.

The authorities on the question of possession as notice of title are gathered in an extensive note in 13 L.R.A.(N.S.) 51.

gations assumed under the lease constitute a sufficient consideration for the option.

**Construction of option.**

2. An option for the purchase of a particular parcel of land at a specified price per acre is not void for uncertainty as the acreage can be determined by measurement, and the price is payable at the time the option is exercised.

**Specific performance — conflicting evidence — reversal on appeal.**

3. It is the province of the trial court to determine the conclusions to be drawn from conflicting testimony, and the findings of that court must be clearly against the evidence to justify this court in interfering therewith, whether the fact found is required to be established by a preponderance of evidence, or by clear, convincing and satisfactory proof. The evidence in this case is sufficient to sustain the findings of the trial court to the effect that the written option had subsequently been modified by parol, and that the parol agreement had been acted upon to such an extent as to warrant specific enforcement thereof.

**Notice to purchaser.**

4. A purchaser of real estate who has knowledge of facts sufficient to put him upon inquiry as to the rights of another therein, and who fails to make such inquiry, is chargeable with notice of such rights and his purchase is subject thereto. Under this rule, the purchase by defendant Rustad was subject to the equitable rights of plaintiff.

Action in the district court for Traverse county to enforce specific performance of a certain oral contract. The case was tried before Parsons, J., who made findings and as conclusion of law found that defendant L. A. Anderson should be required to specifically perform the conditions of the oral agreement of June, 1912, upon payment of the purchase price by plaintiff, and that defendant Rustad had no interest in the property. From an order denying their motion for a new trial, defendants appealed. Affirmed.

*Cliff & Purcell, Edward Rustad and Charles E. Houston, for appellants.*

*James B. Ormond and F. W. Murphy, for respondent.*

TAYLOR, C.

The trial court decreed the specific performance of a contract, made

by plaintiff with defendant L. A. Anderson, for the purchase of the southeast quarter of section 14 in township 127 of range 47 in Traverse county; and defendants, other than the insurance company, appealed from an order denying their motion for a new trial.

Defendant L. A. Anderson is the owner of the land, and had rented it to plaintiff for the year 1911 for a cash rental of \$320. On October 31, 1911, he made a written contract with plaintiff which recited that plaintiff had rented the land for the year 1911, that the crops for that year had proven a failure, and that plaintiff had rented the land for the year 1912 for the sum of \$320 to be paid on November 1, 1912. The contract then provided that plaintiff should have absolute possession of the entire premises and have all the rents and profits thereof during the season of 1912; and that he should plant the land to such crops as he chose, should have the right to break up and seed any of the unbroken land that he chose, and should not be required to plow back any of the premises. The contract also gave plaintiff the option to purchase the land, at any time on or before November 1, 1912, at the rate of \$55 per acre.

Defendants contend that this option is void for two reasons: First, that there is no consideration to support it; second, that its terms are too uncertain and indefinite to be enforced. They do not contend that the obligations assumed under the lease would not constitute a sufficient consideration to sustain the option, if both were a part of the same transaction, but insist that the contract merely contains a recital that a lease had been made, and is not itself the contract of leasing. We are unable to concur in this construction of the contract. It defines the terms of the rental and the rights of the parties, and, as no other or different contract of leasing is shown, we think it must be given effect as itself constituting such contract. Defendants insist that the option is too uncertain and indefinite for enforcement, in that it specifies the price as \$55 per acre, but fails to specify the number of acres, or the time, or terms, of payment. It specifies a particular parcel of land which, according to the system of official surveys, should contain 160 acres; the correct acreage may easily be ascertained by measurement; the price per acre is fixed; and a simple computation will determine the exact purchase price. In the ab-

sence of any provision to the contrary, such purchase price would become payable in cash at whatever time plaintiff should elect to enforce his option, and as a condition to such enforcement. It follows that the option contained in the contract is not open to the objections urged.

The trial court found as a fact that in June, 1912, plaintiff notified defendant L. A. Anderson that he had decided to purchase the land, and further found that it was verbally agreed between them, at the time of such notification, that plaintiff should assume a mortgage of \$1,500 against the property, should pay the sum of \$1,500 on or before November 15, 1912, should pay the remainder of the purchase in instalments of \$1,000 each, payable on November 1, 1913, and annually thereafter until the full purchase price has been paid, should pay interest on deferred payments at the rate of 6 per cent per annum from November 1, 1912; should have the right to pay all or any portion of the purchase price at any time he might wish before the dates fixed therefor, and that Anderson should execute to him a warranty deed of the premises free from all encumbrance, except the above mentioned mortgage, whenever the remainder of the purchase price over and above such mortgage should be paid in full.

Plaintiff testified fully and positively to the agreement outlined in the above finding. Anderson denied it. Defendants attack the finding on the ground that, to warrant specific performance, the contract must be established by clear and convincing proof, not by a mere preponderance of evidence, and that the proof of the oral agreement, measured by this rule, is not sufficient to justify the finding. The rule invoked is the rule which governs the trial court in making its findings, but is not the rule which governs this court in considering and passing upon the findings of a trial court. The province of this court is to determine whether the findings of the trial court are reasonably sustained by the evidence, and the rule governing this court is the same whether a preponderance of evidence, or a greater weight of evidence, be required to establish the facts found by the trial court. As said in *Oertel v. Pierce*, 116 Minn. 266, 133 N. W. 797, Ann. Cas. 1913A, 854:

"The evidence must be clearly against the findings to justify in-

terference by this court, whether the fact found is required to be established by a preponderance of the evidence, or by clear, convincing, and satisfactory evidence."

Under this rule the evidence amply sustains the finding in question.

The finding to the effect that plaintiff had made substantial and valuable improvements upon the land under his contract of purchase falls within the same rule, and cannot be disturbed for the same reason.

During the season of 1912, plaintiff performed work in eradicating noxious weeds, in improving the drainage of the land, in removing stone, in plowing for the crop of 1913, and in putting the farm in good condition for future use, which he was not required to do under his lease, and which is not expected of a mere tenant. Part of this work was done before making the oral contract and part thereafter. Anderson knew of these improvements and the court could properly infer from the evidence that he knew that plaintiff made them in the expectation of buying the farm. These facts coupled with the fact that plaintiff permitted the time fixed by the original written contract to lapse and thereby lost his rights thereunder, but demanded performance on the part of Anderson within the time fixed by the oral contract, are sufficient to sustain the decision of the trial court directing a specific performance of the oral agreement. *Janochosky v. Kurr*, 120 Minn. 471, 139 N. W. 944, and cases cited therein.

Defendant Rustad wanted the farm, and before the written option expired made an arrangement with Anderson for its purchase in case plaintiff failed to exercise his option. On November 2, 1912, they made a written contract whereby Anderson sold and Rustad purchased the farm. The contract provided for a cash payment and for the payment of the remainder of the purchase price in instalments on or before the dates fixed therein, and for a conveyance of the property when such purchase price should be paid in full. By virtue of this contract Rustad claims to be a good faith purchaser of the farm free and clear of all equities on the part of plaintiff. A brief outline of the situation is necessary to understand the question presented. Plaintiff owned a farm adjoining the one in controversy, and during the summer of 1911 and the summer of 1912 conducted his farming op-

erations upon both places from the buildings upon his own farm. In the fall of 1912, and apparently in October, he installed a tenant or employee in the buildings on the land in controversy, and placed some of his stock thereon to be cared for by this employee. He also continued plowing thereon until the ground froze. He had an employee living on the land, had stock thereon, and had teams engaged in plowing thereon at the time Rustad made his contract to buy it. Rustad had full knowledge of plaintiff's written contract, but no actual knowledge of his oral agreement. The land lies about a mile from the village of Wheaton where both Rustad and plaintiff resided, and abuts upon one of the main highways leading from that village. Rustad was familiar with the premises, and, at the time of making his contract, knew that some one had recently moved into the buildings and was then actually occupying them. The plowing was open and visible to any one, and could not have been done under the lease, for that expressly relieved plaintiff from doing any plowing. Rustad not only made no inquiry of plaintiff or of his tenant as to the rights they claimed in the property, but exacted a promise from Anderson not to disclose to plaintiff any of the transactions between himself and Anderson.

The elements necessary to constitute a good-faith purchase of real estate are discussed and fully explained in *Bergstrom v. Johnson*, 111 Minn. 247, 126 N. W. 899, and, under the rules there stated, we think the facts of the present case imposed upon Rustad the duty to inquire concerning the rights of plaintiff, and that he is chargeable with notice of all facts which such inquiry would have disclosed. In other words he is chargeable with notice of plaintiff's rights, and hence is not in position to invoke the rules which protect a purchaser who, in good faith, consummates his purchase without notice of outstanding equities.

The foregoing are the substantial questions raised upon the appeal, and as they do not justify a reversal, the order appealed from is affirmed.

GEORGE BOMBOLIS v. MINNEAPOLIS & ST. LOUIS  
RAILROAD COMPANY.<sup>1</sup>

December 31, 1914.

Nos. 18,922—(154).

**Federal Employer's Liability Act — nonresident alien — special administrator.**

In this action under the Federal Employer's Liability Act to recover for the death of plaintiff's intestate, it is *held*:

(1) The evidence made a case for the jury, and is sufficient to sustain the verdict.

(2) There was no fatal variance between the allegations of negligence and the proof.

(3) It conclusively appeared that no petition was presented to the probate court for the appointment of a special administrator. Such petition is jurisdictional, and, without it, the probate court has no jurisdiction to appoint such administrator, to approve his bond or to issue letters of administration. Such orders are nullities, and a settlement made by the special administrator so attempted to be appointed, in no way binds the next of kin of deceased dependent upon him for support.

(4) The allegations of the reply were sufficient to raise the question of the jurisdiction of the probate court.

(5) Nonresident aliens are entitled to the benefits of the Federal Employer's Liability Act.

(6) The five-sixths jury law applies in an action in the state court based upon the Federal statute, following *Winters v. Minneapolis & St. Louis R. Co.* 126 Minn. 260.

Action in the district court for Hennepin county by the administrator of the estate of Constantine Nanos, deceased, to recover \$25,000 for the death of his intestate. The case was tried before Jelley, J., who denied defendant's motion to dismiss the action, and a jury

<sup>1</sup> Reported in 150 N. W. 385.

---

Note.—The question of the constitutionality, application and effect of the Federal Employer's Liability Act is discussed in a note in 47 L.R.A.(N.S.) 38.

which returned a verdict for \$3,750, to be apportioned between the surviving widow and children as specified in the verdict. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

*W. H. Bremner and F. M. Miner*, for appellant.

*George B. Leonard and M. Rose*, for respondent.

BUNN, J.

This action is to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. There was a verdict for plaintiff in the sum of \$3,750, the damages being apportioned as required by the Federal act under which the action was brought. Defendant moved for judgment notwithstanding the verdict or for a new trial, and appealed to this court from an order denying this motion.

1. It is first contended that there was no proof of negligence on the part of defendant sufficient to justify submission of the issue to the jury, or at least that the evidence did not warrant the jury in deciding this issue against the defendant.

The accident happened in the Kenwood yards of defendant in Minneapolis. At the place where it occurred defendant has two main tracks, designated the north-bound and the south-bound mains. A lead track connects with one of the main tracks some distance away, and runs parallel with the two mains. The distance between the middle track and each of the other tracks is about ten feet. Plaintiff's intestate, Nanos, and seven other employees of defendant, were engaged in the work of removing old ties from the middle track and substituting new ones. The method of removing an old tie was to draw it out from under the rails in a trench dug between the middle track and the lead at right angles to the tracks. The ties were eight feet long. After the ties were drawn out they were laid parallel to and between the tracks. While Nanos and his "partner" were in the space between the middle track and the lead track, with their picks in a tie, a freight train on the middle track signalled its approach. The men observed the warning and hurried to clear away obstructions from the course of the approaching train. Nanos and

his partner were engaged in turning parallel with the tracks a tie that they had just pulled from under the middle track. This was necessary, in order to prevent the engine of the approaching train from striking it. The freight train passed, and at about the same time a switch engine on the lead track struck Nanos, causing his death.

The negligence alleged and relied on is the failure of the switch engine crew to give the men working between the tracks a warning of its approach. No such warning was in fact given, or at least the jury was abundantly justified in so finding. There was testimony by at least four witnesses that it was the custom to give warning of the approach of a switch engine whenever there were men working on the track. We think that the question whether the engineer of the switch engine was negligent in not ringing his bell as he approached these men was for the jury, and that the evidence sustains the verdict on this issue. It is urged that the engineer ought not to have anticipated that the men working on the main track would take a position on or so near the lead track as to be in danger from the switch engine. But their work required them to be between the main track and the lead, the freight train was approaching on the main track, and the men were getting out of its way. It is not going very far or imposing a very onerous duty to hold that the engineer should have rung the bell.

Whether deceased was negligent was quite plainly a jury question. The case being under the Federal Employer's Liability Act, contributory negligence was not a defense, and for all that we know the jury may have found Nanos negligent and reduced the damages accordingly. This renders unnecessary a decision of the sufficiency of the evidence to support a conclusion that deceased was not negligent.

2. We find no merit in defendant's claim that there was a fatal variance between the negligence pleaded and that proved. The complaint alleged that no warning was given of the approach of the switch engine. It was not necessary that each allegation of fact be proved as alleged.

3. Defendant's main argument concerns its claim that it settled the cause of action with a special administrator of the estate of the

deceased. The answer pleaded that John F. Bernhagen was, by the probate court of Hennepin county, duly appointed special administrator of the estate of the deceased, that he gave bond and qualified, and that thereafter it was agreed between said administrator and defendant that defendant should pay in full compromise and settlement of all liability for the accident the sum of \$700; that this sum was paid to and received by the administrator, and writings given releasing defendant from liability. The reply contained a general denial, an admission that the probate court "did grant a form of order assuming to appoint said John F. Bernhagen special administrator," and lengthy allegations of fraud in procuring the order, and in the settlement thereafter made.

On the trial, to sustain its defense of settlement, defendant offered in evidence the order of the probate court appointing the special administrator, the bond and order approving it and the letters of special administration. Plaintiff's attorney stated that he understood counsel that no written petition was filed in the probate court for the appointment of a special administrator, and that the order appointing Bernhagen was made without any petition being on file. Counsel for defendant then said: "Yes, we have no objection to admitting that, sir." Plaintiff then objected to the offered exhibits, because it appeared that the probate court never acquired jurisdiction over the estate of the deceased. The objection was sustained, but, on request of counsel for defendant, the matter was deferred until the following morning. When court convened then, defendant's counsel modified the admission made the day before that no petition was filed in the probate court, by admitting that this was true as far as the probate court records showed. The trial court did not think that this changed the aspect of the case, ruled that it appeared that no petition for the administrator was filed prior to the appointment, that this was jurisdictional, and sustained the objection. Defendant then proceeded to offer evidence of the settlement alleged. Objections were sustained. Among the offers of evidence so made was one to show that Mr. Patterson, an attorney, called upon the probate judge, discussed with him the death of Nanos, and asked what was best to be done. The judge advised the appointment of a special adminis-

trator, and stated he would appoint Mr. Bernhagen. Patterson asked if he should file a petition, and the judge replied it would not be necessary.

It seems very clear that it was a conceded fact that no written petition was presented to the probate court, and we hold that no such petition was presented, not merely that no petition appeared in the files. It is therefore as if the want of jurisdiction, if a petition was jurisdictional, appeared from the face of the proceedings. The question then is: Was a written petition a jurisdictional prerequisite to the appointment of a special administrator? If it was, the order of appointment and subsequent proceedings were void, and subject to collateral attack. If not, if the failure to file or present a petition was merely an irregularity, it does not make the proceedings void.

The Constitution gives the probate court jurisdiction over the estates of deceased persons. But, to exercise this jurisdiction, it is necessary that the court be called upon to act in the manner provided by law. *Culver v. Hardenbergh*, 37 Minn. 225, 33 N. W. 792. As stated in *Hanson v. Nygaard*, 105 Minn. 30, 117 N. W. 235, 127 Am. St. 523: "The Constitution of the state confers upon the probate courts general and exclusive jurisdiction over the estates of deceased persons. \* \* \* This jurisdiction in the abstract is conferred upon the probate court of the state as a whole; but it can only be exercised by a particular court in a particular instance, and over a particular estate, when it has been invoked in the manner prescribed by the statutes. When thus invoked by a person entitled to take such action, the jurisdiction of that court attaches to the estate for the purpose of supervising, directing and controlling its administration and settlement according to law."

Was the jurisdiction of the probate court over the estate of Nanos invoked in the manner prescribed by our statutes? We unhesitatingly answer this question in the negative.

G. S. 1913, § 7227, provides: "Every proceeding in the probate court shall be commenced by petition, briefly setting forth the ground of the application, and signed by or on behalf of the party making the same, and be verified as in the case of pleadings in civil actions."

That this statute applies to a proceeding for the appointment of a

special administrator there can be no doubt. It is a general provision, and by its own terms applies to every proceeding. In *Hanson v. Nygaard*, supra, it was held that the failure to give notice to interested parties of the hearing on a petition for the appointment of an administrator was an irregularity merely, and not a jurisdictional defect. But it was plainly held that a petition was necessary to confer jurisdiction. Mr. Justice Elliott said: "Our conclusion, therefore, is that the jurisdiction of the probate court over the estate of a deceased person attaches when its general jurisdiction is invoked by the presentation to the court of a proper petition by some person entitled to take such action."

The statute authorizing the appointment of a special administrator, R. L. 1905, § 3702 (G. S. 1913, § 7293), permits it to be made "with or without notice," but it does not say or intimate that it may be made without a petition. This statute was considered in *Hanson v. Nygaard*, and was said to authorize the appointment of a special administrator without notice, but not that it could be done without a petition. But it needs no authorities to substantiate the proposition that the probate court cannot act unless it is asked to do so in the manner prescribed by statute. We hold that the probate court had no jurisdiction over the estate of Nanos, no power to appoint a special administrator, until a petition was presented to it by some person entitled to take such action. It appearing conclusively that no such petition was presented in this case, it follows that the orders appointing the special administrator, approving his bond, and granting letters of administration, were absolutely void. It is of course elementary that letters of administration issued by a court with jurisdiction are not subject to collateral attack for error or irregularity, but where the court is without jurisdiction the letters are void, and may be attacked collaterally. This also is elementary. It is the universal rule, applicable to orders and judgments of all courts. *Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 11 L.R.A.(N.S.) 803, 118 Am. St. 612, 11 Ann. Cas. 348. The case cited is also abundant authority, if any is needed, that a grant of "jurisdiction of the subject matter" does not authorize a court to determine questions not brought before it by the pleadings. *A fortiori*, the general jurisdiction of

probate courts over the estates of decedents does not authorize a particular court to act in a particular estate without any pleading invoking its jurisdiction.

We do not sustain the claim that the reply was insufficient to raise the question of the want of jurisdiction of the probate court. It is true that fraud was pleaded, but there was a denial that a special administrator was appointed. This was sufficient to put in issue the validity of the pretended order.

The conclusion thus reached makes the settlement relied on an absolute nullity, though it be conceded that a special administrator regularly appointed has power to settle a cause of action for damages sustained by the next of kin of the decedent dependent upon him for support, without the consent or knowledge of the real parties in interest to or of either the appointment or the settlement. *Foot v. Great Northern Ry. Co.* 81 Minn. 493, 84 N. W. 342, 52 L.R.A. 354, 83 Am. St. 395; *Jones v. Minnesota Transfer Ry. Co.* 108 Minn. 129, 121 N. W. 606. This is a question we do not decide.

5. Whether next of kin who are nonresident aliens are entitled to the benefits conferred by the Federal Employer's Liability Act is a question which has not been directly decided by the Supreme Court of the United States. In the absence of such a decision, we follow *Renlund v. Commodore Mining Co.* 89 Minn. 41, 93 N. W. 1057, holding our state statute to be for the benefit of nonresident aliens, as well as residents of this state and of other states, and hold that the nonresident aliens are entitled to the benefits of the Federal Act.

6. Following *Winters v. Minneapolis & St. Louis R. Co.* 126 Minn. 260, 148 N. W. 106, we hold that in an action in a state court based upon the Federal Employer's Liability Act, the five-sixths jury law (G. S. 1913, § 7805) applies.

Order affirmed.

ROBERT H. PEERY v. ILLINOIS CENTRAL RAILROAD COMPANY.<sup>1</sup>

December 31, 1914.

Nos. 18,946—(168).

**Federal Employer's Liability Act.**

1. Ruling on a former appeal in this case, that it is within the operation of the Federal Employer's Liability Act, adhered to.

**Reading pleadings to the jury error.**

2. The failure of the trial court to heed the views of this court, heretofore expressed, with regard to reading pleadings to the jury in the course of the charge, *held* error, but not prejudicial so as to warrant reversal.

**Damages not excessive.**

3. Verdict of \$9,000, reduced by the trial court from \$12,000, *held* not excessive, in an action by a railroad conductor for damages sustained through the negligence of defendant.

After the former appeal, reported in 123 Minn. 264, 143 N. W. 724, the case was tried before Kelly, J., and a jury which returned a verdict in favor of plaintiff for \$12,000. Defendant's motion for judgment in its favor notwithstanding the verdict was denied. Its motion for a new trial was denied, if plaintiff consented to a reduction of the verdict from \$12,000 to \$9,000. From that order defendant appealed. Affirmed.

*Butler & Mitchell*, for appellant.

*Samuel A. Anderson* and *A. F. Storey*, for respondent.

PHILIP E. BROWN, J.

In this, an action for personal injuries based upon the Federal Employer's Liability Act, plaintiff had a verdict. Defendant appealed from an order denying its alternative motion.

<sup>1</sup> Reported in 150 N. W. 382.

---

Note.—As to the constitutionality, application and effect of the Federal Employer's Liability Act, see note in 47 L.R.A.(N.S.) 38.

1. The case was here on plaintiff's appeal, reported in 123 Minn. 264, 143 N. W. 724, where the facts are stated and it was held, upon substantially the same evidence presented by the present record, that the Federal act applied, or at least that its applicability should have been submitted to the jury; the only new fact brought out on the second trial in this connection being that plaintiff, a freight conductor, at the time of his injury, was making out his reports showing the amount and causes of delays at or between stations, covering the entire trip from and back to Paducah.

Defendant contends that the evidence was insufficient to justify a finding that plaintiff, when injured, was either employed or engaged in interstate commerce, and, further, that in any event it was error to determine this question in his favor as a matter of law as the court below did, instead of submitting it to the jury. Taking up the latter question first, we find no error. The facts being undisputed and the inferences clear, there was nothing for the jury to pass on in this connection.

On the main question, defendant urges that the decision of the United States Supreme Court, in *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. ed. 1051, Ann. Cas. 1914C, 163, rendered since the case was here before, requires the overruling of our former holding. In *Cousins v. Illinois Central R. Co.* 126 Minn. 172, 148 N. W. 58, the Behrens case was considered in connection with the Pedersen case, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. ed. 1125, Ann. Cas. 1914C, 163, on which the decision on plaintiff's appeal was largely based, Mr. Justice Bunn saying [p. 175]:

"Counsel for defendant correctly say that the decision in the Pedersen case has apparently warranted the conclusion that the Federal Supreme Court would ultimately construe the act of Congress as applicable to practically all employees of interstate railroads, except possibly those engaged in the work of new construction of instrumentalities as distinguished from repairs upon old instrumentalities. But they refer to the case of *Illinois Central R. Co. v. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. ed. 1051, Ann. Cas. 1914C, 163, decided by the Supreme Court April 27, 1914, as indicating a less liberal construction of the act. We do not see that the Behrens case is in

point. The employee was at the time of the injury engaged in moving cars loaded wholly with intrastate freight from one part of the city to another, and it was held that this was not a service in interstate commerce."

This court held, that "under the test laid down in the Pedersen case and approved in the Behrens case," namely, whether the work in question was a part of the interstate commerce in which the carrier was engaged, an employee of an interstate and intrastate carrier, who was wheeling coal for use in the company's shops where cars were being repaired which had been and were used in interstate commerce, was within the protection of the Federal act.

We have considered the Behrens case in the light of counsel's argument, and, finding nothing therein inconsistent with the views expressed in our former opinion, adhere thereto.

2. Error is assigned to the action of the court in reading, in the course of its charge, portions of the complaint. This was error, as to which nothing need be added to what was said in *Savino v. Griffin Wheel Co.* 118 Minn. 290, 294, 136 N. W. 876. However, error does not warrant a reversal unless coupled with prejudice; and, taking the charge as a whole we are unable to say that defendant was prejudiced by the court's failure to heed the views heretofore expressed by this court upon the practice in question. Moreover, no objection was made thereto on the trial.

3. Defendant claims that the damages were so excessive as to appear to have been awarded under the influence of passion or prejudice. The court reduced the verdict from \$12,000 as rendered, to \$9,000. Plaintiff, at the time of his injury, was 38 years old, and earning from \$125 to \$130 per month. Up to the time of the last trial he had been practically idle for more than two years; and it also appeared that, besides minor injuries, his height was reduced two inches, and that he now has a forward curvature and stiffness of the upper portions of his spine and in his neck, resulting in a permanently stooped position. The evidence, which it is not necessary to discuss in detail except to say that the medical testimony was sharply and unusually conflicting, was ample to sustain a finding of stiffness in the right shoulder joint, resulting in inability to raise the arm

above a horizontal position; that these conditions were permanent; that plaintiff was likely to be considerably incapacitated, and would suffer more or less pain. We are unable to say that the verdict warrants the imputation contended for or that, as reduced, it is excessive.

Order affirmed.

On February 5, 1915, the following opinion was filed:

PER CURIAM.

This is an appeal from a judgment. The facts, and the law applicable thereto, are sufficiently stated on an appeal from an order in the same case reported above. For the reasons there stated it is ordered that the judgment stand affirmed.

---

MARTIN HANSON v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>

December 31, 1914.

Nos. 18,968—(161).

**Negligence — evidence.**

Evidence considered and held to conclusively show no negligence on the part of defendant.

Action in the district court for Polk county to recover \$25,500 for personal injuries received while in the employ of defendant. The case was tried before Watts, J., who denied defendant's motion for a directed verdict in its favor, and a jury which returned a verdict for \$7,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed and judgment ordered for defendant.

*M. L. Countryman, A. L. Janes and James Montague*, for appellant.

*W. E. Rowe and F. A. Grady*, for respondent.

<sup>1</sup> Reported in 150 N. W. 380.

BUNN, J.

This is an action to recover for personal injuries. Plaintiff had a verdict, and defendant appealed from an order denying its motion for judgment notwithstanding or for a new trial.

It is a matter of some difficulty to state the facts so they will be clearly understood. Plaintiff had worked for defendant as a bridge builder for five years prior to his injury. December 5, 1912, he, with three other men, was directed to chip away rock at the head of the lower bridge chords on the east parapet of defendant's bridge crossing the Red Lake river at Crookston. The lower chords of the bridge are of steel and rest on stone abutments. In order to take care of the expansion and contraction of the chords it is necessary from time to time to chip away the surface of the stone parapet in front of the chord. This is the work that plaintiff and the other men were directed to do and were doing at the time of the accident. The place in which plaintiff was required to do this work was a triangular or "V" shaped area on the easterly side of the south end of the bridge structure. Along the easterly side of this area the stone abutment continued in the form of a perpendicular wall to a height of six feet and a half, with an overlapping coping at the top. On the westerly side is the chord of the bridge resting on a device known as a roller casting which rests on an iron plate on the stone floor of the abutment. This roller casting extended into the open space five inches, and was 30 inches long and five inches in height above the floor. The triangular area was approximately two feet in width at the north end, and tapered back to a few inches at the south end; it was four feet in length. The stone floor of the space was 13 feet above the frozen river below. In chipping the stone back of the end of the chord or girder, plaintiff used a hammer and chisel, standing with his left foot on the stone floor and his right on the roller casting. There were four bolts through this roller casting, and the nuts protruded an inch and a quarter above it. These nuts were nine inches apart. Plaintiff's right foot was placed between two of them. It was about two feet from where plaintiff stood in doing his work to the outer edge of the floor of the space. During the day before the accident happened and during a portion of the

fatal day, plaintiff had worked with a "partner," who held the chisel while plaintiff handled the sledge. By afternoon of the day the accident happened the work had progressed so far towards the apex of the triangle that but one man could work at a time, and by standing as we have stated plaintiff did. It was necessary to stoop forward and stand in a rather cramped position in order to reach the stone that was to be chipped. After working for some time in this position, plaintiff straightened up to rest his muscles. In some manner, not very clearly explained by plaintiff, his right foot slipped or caught against one of the nuts on the roller casting, he lost his balance and fell to the ice below. The injuries received were so serious that it is not urged that the verdict of \$7,000 is more than fair compensation, if defendant is liable at all for the accident.

The only negligence charged is that defendant failed to furnish plaintiff a safe place to work. The claim in this regard, and the only claim, is that defendant should have constructed and placed in the "V" shaped space a wooden platform, covering its entire area, including the roller casting. Carpenters testified that this could have been done. Such a platform would have covered the casting and the projecting nuts of the bolts, and would have been five inches above the stone floor. It would have made the space somewhat wider at the apex and probably would have given somewhat more room for men to stand in doing the work of chipping stone. But we are wholly unable to see that a finding of negligence is justified because such a platform was not built into the space. In no respect would it make the place any safer, unless it be because the platform would cover the roller casting and the nuts that protruded above it. How these nuts were a source of danger to men working in the space we are unable to see. On the contrary it would seem that they were an effective prevention against the slipping of the workman's foot, which is apparently the chief if not the only danger to be feared. A wooden platform, when covered with snow and ice, does not suggest itself as particularly safe, or a better guard against a workman's slipping and losing his balance than was the rough stone floor on which to rest the left foot and the nuts on the roller casting against which the right foot could rest. The place was dangerous in no

different way than is any place so high above solid earth that a false step or loss of balance may mean death or serious injury. It was plainly much less dangerous than many places where men are working every day. The master's duty as to furnishing a safe place is only to use reasonable care, and what is reasonable care depends much upon the particular circumstances. To hold that defendant was guilty of a breach of duty to its servants, because it did not floor over this triangular place in which men were occasionally required to stand while working, would be carrying the safe-place doctrine too far. We would next be asked to say that a contractor for the construction of a modern skyscraper must build platforms for the men who are fitting steel joints and girders high above the ground, or that a window washing concern must furnish its men scaffolding to use when doing their work. The danger in this case was inherent in the nature of the work, and we are not able to perceive how defendant could have removed or lessened this danger by any precaution it could take. The accident was a most unfortunate one, but it seems to have been a pure accident and not due to any fault of defendant. This being the conclusion, it is unnecessary to consider the question of assumption of risk. As it fairly appears that no case of negligence was made by the evidence, and that from the nature of the facts, no case of liability can be made if there is another trial, it is best to end the litigation here.

Order reversed and judgment for defendant ordered.

On January 15, 1915, the following opinion was filed:

**PER CURIAM.**

The application for a reargument of this case is denied. At the request of plaintiff's counsel, the opinion is amended by adding at the end thereof before the words "Order reversed," the following paragraph:

"The bridge was used by trains carrying interstate commerce. We decide that the facts proven do not make out a case of negligence in failing to furnish a reasonably safe place within the meaning of the Federal Employer's Liability Act."

STEPHEN TENVOORDE v. NANCY R. TENVOORDE and  
Another.<sup>1</sup>

January 8, 1915.

Nos. 18,841—(95).

**Equitable mortgage.**

1. The plaintiff, having an option to purchase a lot, entered into an arrangement with the defendants whereby title was to be taken in the name of one of them, and held as security for advances to the plaintiff, and this was done. It is *held* that by this arrangement an equitable mortgage was created.

**Same — evidence.**

2. The evidence justifies a finding that an arrangement such as is recited was made.

**Redemption — deposit in court for judgment creditor.**

3. A money judgment was docketed against the husband of the defendant in whose name title was taken, and the court directed that the amount due upon this judgment be taken from the amount necessary to be paid in redemption by the plaintiff, and deposited in court to await the determination of the claim of the judgment creditor to the land if such claim should be asserted. *Held* error.

Action in the district court for Stearns county for judgment decreeing that Nancy R. Tenvoorde be declared trustee of the title of certain premises for the use and benefit of plaintiff and that she convey them to plaintiff upon being paid the amount of her advances to him. The case was tried before Roeser, J., who made findings that plaintiff was the owner of the real estate, subject to the lien of defendant Nancy R. Tenvoorde for the sum of \$2,957, and authorizing her to foreclose her equitable mortgage for that amount

<sup>1</sup> Reported in 150 N. W. 396.

---

Note.—On the question whether the deposit of title deeds constitutes an equitable mortgage, see note in 19 L.R.A.(N.S.) 206. And as to the necessity and character of one's previous interest in land essential to his claim as an equitable mortgagor, see note in 37 L.R.A.(N.S.) 521.

if plaintiff failed to pay that amount within the time specified. The case was dismissed as to the defendant other than Nancy and her husband. From the judgment entered pursuant to the order for judgment, she and her husband appealed. Reversed.

*Axel A. Eberhart*, for appellants.

*R. B. Brower*, for respondent.

DIBELL, C.

This is an action to have a deed of a lot in St. Cloud, Stearns county, adjudged to be a mortgage. There was judgment for the plaintiff adjudging the deed to be a mortgage, providing that the plaintiff might redeem from it within a stated time, and providing that if no redemption was made the defendant who was adjudged to hold as mortgagee might foreclose. The action was dismissed as to the defendant other than John H. Ten Voorde and Nancy Ten Voorde. They appeal from the judgment.

1. The defendants, John H. Ten Voorde and Nancy Ten Voorde, are husband and wife. The deed, which the plaintiff asks to have adjudged a mortgage, was made by the owner, one Freeman, to Mrs. Ten Voorde, on April 1, 1910. The understanding between the plaintiff and the defendants was that Mrs. Ten Voorde should take and hold the title as security for advances to the plaintiff.

At the time of the execution of this deed the plaintiff had a valid option to purchase the lot. The arrangement in effect was that the plaintiff should not take title under it, but that the title should pass from Freeman to Mrs. Ten Voorde, and she should hold it as security. Under these facts Mrs. Ten Voorde was an equitable mortgagee. The case is controlled by the principle of such cases as *Fisk v. Stewart*, 24 Minn. 97; *Niggeler v. Maurin*, 34 Minn. 118, 24 N. W. 369; *Stitt v. Rat Portage Lumber Co.* 94 Minn. 529, 103 N. W. 1133; and *Grout v. Stewart*, 96 Minn. 230, 104 N. W. 966. It is not important that the title came from Freeman instead of directly from the plaintiff. *Fisk v. Stewart*, *supra*. It is not important that all, or even any, of the debt did not exist at the time, but was to be advanced afterwards. *Teal v. Sandinavian-American Bank of Grand Forks*, 114 Minn. 435, 131 N. W. 486. The appellants cite *Bennett*

v. Harrison, 115 Minn. 342, 132 N. W. 309, 37 L.R.A.(N.S.) 521. That case is not out of harmony with the application of the law here made. The court there held that the one seeking to have the grantee in a deed adjudged to be a mortgagee was not related in interest to the title at the time of the conveyance so that he could assert in equity the interest or title of a mortgagor. Here the plaintiff was.

2. The evidence justifies a finding of facts making applicable the principles of law stated and the facts were so found. The degree of proof required to declare a deed to be in fact a mortgage is well understood. We have considered the evidence with care and with the degree of proof required in mind. Nothing will be gained by reviewing it. We doubt not the facts were wisely found.

3. In 1909 judgment was docketed in Stearns county in favor of one Graves and against the defendant John H. Ten Voorde, upon which there was due between \$700 and \$800 at the time of the trial. The court directed that of the amount necessary to redeem from Mrs. Ten Voorde, the advances made by her amounting to several thousand dollars, there should be paid into court the sum of \$800 to abide the determination of the rights of Graves to the lot, through this judgment, if he should assert a claim; and it was contemplated that a like payment should be made, if there should be no redemption and the property should go to foreclosure sale. In this there was error.

The court found that Mrs. Ten Voorde was the equitable mortgagee. There was no suggestion in the pleadings, nor at the trial, nor in the findings, that her husband had an interest in the lot. The Graves judgment was not a lien upon the legal title. The only theory upon which Graves could assert a right to the lot was that Mrs. Ten Voorde held the title under the Freeman deed, not as an equitable mortgagee, but as the legal owner, and that her ownership was the concealed ownership of her husband proper to be subjected to the payment of his debts. That theory defeats the plaintiff's judgment. If the plaintiff feared a claim on the part of Graves he could have made him a party. He should not now ask that a payment be made into court which it is wrong to make if his judgment is right.

The appellants make some other contentions which do not require mention.

There should not be a new trial. There should be a modification of the judgment in respect of the required deposit; or, in its discretion, the court may entertain a motion to make Graves a party; or any other appropriate proceeding not inconsistent with this opinion may be taken.

Judgment reversed.

---

**MARTIN RASKI v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>**

January 8, 1915.

Nos. 18,882—(126).

**Damages for injury to animal.**

1. *Keyes v. Minneapolis & St. L. Ry. Co.* 36 Minn. 290, to the effect that for the wrongful injury to an animal, the injury being such as may be cured by treatment, the owner is entitled to recover the diminished value of the animal after cure, so far as effected, the expense of treatment, and the value of the use of the animal while under treatment, followed and applied.

**Same—charge to jury.**

2. Where the defendant in such an action insists on the trial that the rule of damages is the difference in value before and immediately after the injury, and the evidence upon the subject is limited accordingly, the charge of the court in harmony with the rule so insisted upon is error without prejudice.

**Same—expense of treatment.**

3. Where the owner of the animal is given the difference in value before and immediately after the injury, he is not entitled to the expense of treatment administered in efforts to cure the injury.

<sup>1</sup> Reported in 150 N. W. 618.

128 M.—9.

January 26, 1915.

**Costs on appeal.**

4. Where it is unnecessary on appeal to print the entire record in order to present the questions raised on appeal, taxation of disbursement for that item will be cut down to the proper amount. [Reporter.]

Action in the district court for St. Louis county to recover \$1,000 for injuries to plaintiff's horses and \$150 for the death of a pig. The case was tried before Ensign, J., and a jury which returned a verdict for \$899.90. From an order denying defendant's motion for a new trial, it appealed. Affirmed on condition.

*Baldwin, Baldwin & Holmes*, for appellant.

*John R. Heino* and *Theodore Hollister*, for respondent.

BROWN, C. J.

Defendant's line of railroad extends along the farm land and premises of plaintiff. The company failed to fence its right of way as required by law. Plaintiff owned and kept upon his farm among other domestic animals some pigs and several horses. One of the pigs and four of the horses strayed upon the right of way; the pig was killed and the horses injured by a passing train. This action was brought to recover the value of the pig and damage to the horses, the basis thereof being the failure of the company to fence its right of way. The complaint contained two causes of action, the claim as to the dead pig representing the first and the alleged injury to the horses the second. Plaintiff had a verdict on both, and defendant appealed from an order denying a new trial.

The only errors assigned as grounds for a new trial have reference to the instructions of the court, portions of which are claimed to have been prejudicially erroneous.

1. There were two defenses to the first cause of action, namely (1), that a right of way fence, had it been constructed as required by law, would not have prevented the pig from going upon the right of way, for the reason that the animal was so small that it could have passed under the fence without let or hindrance, therefore that the absence of the fence was not the proximate cause of the

untimely death of the pig; and (2) that the size and value of the pig was greatly overestimated by the plaintiff.

Whether the court erred in its instructions in reference to the first defense is the only question now presented. This does not require extended mention. Our examination of the charge, taken as a whole, leads to the conclusion that in point of substance it sufficiently presented defendant's contention to the jury, and to the effect that if a fence, constructed as required by law, would not have prevented the pig from going upon the right of way, no recovery could be had. Though disconnected parts of the charge are perhaps open to some of the objections made, taken in its entirety, the jury was given clearly to understand the turning point on this feature of the case.

2. Upon the issue of damages for injury to the horses, the court instructed the jury that plaintiff was entitled to recover the difference in value before and immediately after the injury, in the condition in which the injury left them, and in addition thereto "such sum as you believe to be reasonable for plaintiff's time and expenses in attempting to cure the horses" of the injuries so inflicted. This was excepted to by defendant and is assigned as a ground for a new trial.

The rule so stated by the court was in conflict with *Keyes v. Minneapolis & St. L. Ry. Co.* 36 Minn. 290, 30 N. W. 888, where it was held that, in the case of injury to animals, the injury being susceptible to cure by proper treatment, the owner is entitled to recover the diminished market value of the animal after cure, so far as a cure may be effected, and in addition thereto such expenses as he incurred in reasonable efforts to effect a cure, together with the loss of the use of the animal while under treatment, provided the whole does not exceed the original value of the property. The authorities sustaining the rule as there stated are therein cited and the decision has been followed and applied in other states. 2 Notes on Minn. Reports, 982. Of course if the injury be permanent and incurable the rule applied in this case would be proper; if curable the rule of the *Keyes* case applies. But the owner cannot have the diminished value immediately after the injury, and also the subse-

quent expense of treatment and loss of use of the animal. However, in the case at bar in laying down the rule of damages as respects the difference in value of the horses, the court was guided by the course of the trial. Counsel for defendant insisted that the evidence be limited to the condition of the horses before and immediately after the injury, and the evidence was so limited. In view of this situation defendant cannot now complain of the erroneous rule as thus brought about, and the error was without prejudice. This, however, does not deprive defendant of the right to urge as error the instructions insofar as they authorized the jury to include the expense of treating the horses after the injury. As stated, the owner in a case of this kind cannot have both the diminished value, as determined immediately after the injury, and also the expense of treatment. The portion of the charge was therefore erroneous. But the matter may be corrected without a new trial. It appears from the evidence that the amount of plaintiff's claim for expense of treating the horses was \$125. This should be deducted from the verdict.

It is therefore ordered that the order appealed from be reversed and a new trial granted unless, within 10 days after the cause is remanded to the court below, plaintiff shall file with the clerk of that court, a consent to the reduction of the verdict as herein stated. If such consent is so filed the order appealed from will be affirmed.

It is so ordered.

On January 26, 1915, the following opinion was filed:

PER CURIAM.

The errors assigned on this appeal had reference solely to the charge of the trial court, errors being claimed as pointed out in the opinion, yet the entire settled case, containing all the evidence and proceedings on the trial, was printed, the expense for which appellant seeks to tax as a proper disbursement. In view of the character of the questions presented it was unnecessary to print the entire record. Fifty pages would have included all that was essential to an understanding and decision of the questions involved, and the expense of printing the record should be reduced and the clerk's taxation modified accordingly.

G. J. KOHLER v. W. J. JENNISON COMPANY.<sup>1</sup>

January 8, 1915.

Nos. 18,886—(130).

**Mill pond used as playground — liability of owner.**

The owner of a mill pond who permits children to use as a playground the ice formed thereon in winter, is not liable for the death of a child from falling into a hole caused by the ordinary operation of the mill, even though the dust from the mill has caused the hole and the ice about it to become so covered with dust that it is impossible for the eye to distinguish between the ice and the water.

Action in the district court for Swift county by the administrator of the estate of Milton Kohler, deceased, to recover \$7,500 for the death of his intestate by drowning in defendant's mill pond. The answer specifically denied that Milton Kohler was drowned by reason of any negligent act, conduct or omission of defendant, and alleged that deceased was at the time of his death trespassing on the ice and mill pond, without the knowledge, invitation, permission or consent of defendant. The case was tried before Powers, J., and a jury which returned a verdict in favor of plaintiff for \$500. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the verdict, defendant appealed. Reversed.

*T. J. McElligott and Briggs, Thygesen & Everall*, for appellant.  
*John I. Davis and Davis & Michel*, for respondent.

**PER CURIAM.**

Defendant owns a mill pond in the village of Appleton. On December 28, 1912, Milton Kohler, a child of six years and nine months, was drowned by falling through a hole in the ice of the pond.

<sup>1</sup> Reported in 150 N. W. 235.

---

Note.—The authorities on the question of the duty of a property owner to trespassing child are gathered in a note in 32 L.R.A. 559.

The jury found for plaintiff. Defendant moved for judgment notwithstanding the verdict. The motion was denied, judgment entered and defendant appealed.

The facts are as follows: This pond was about two and one-half miles long and 185 feet wide at the widest part. The mill proper stands at one end of the dam. Above and adjoining the mill is a warehouse 100 feet long. About 85 feet above the dam are two booms, 10 feet apart, each made of timbers chained together endwise and each extending across the pond. At a point between the booms, and opposite the lower portion of the warehouse, was located a blow-pipe about ten inches from the surface of the water. In the operation of the mill this pipe discharged dust out upon the pond. The pond had been frozen over about this blow-pipe for nearly six weeks, but the air coming from the pipe was warm and had kept a small area of water from freezing. The dust from the pipe settled on the ice and upon the water in the open hole so that it was impossible for the eye to distinguish where the solid ice left off and the water began. Deceased and another child about the same age had been playing for some time upon the ice with a sled. While playing near this blow-pipe deceased fell into the hole in the ice and was drowned.

The claim of plaintiff is that defendant was negligent in making this hole in the ice and then covering the surface of the water and the ice thereabout with dust so that the hole could not be seen.

It appears that every winter, for at least 17 years, the children of the village used this mill pond for skating, sliding and other childish sports. They skated where skating was good. In 1912, by reason of dust and a light fall of snow, the skating was not good near the blow-pipe, but the children played thereabout. They were all over the pond on good days and used it as a playground. It might be inferred from the evidence that the defendant had knowledge of their presence and acquiesced in their playing there; in other words, that they were licensees. The claim of plaintiff is that defendant was negligent in causing this hole in the ice and then causing the surface of the water and the ice thereabout to be so covered with dust that the hole could not be seen.

A majority of the court are of the opinion that under the facts stated plaintiff is not entitled to recover.

The owner of premises owes some duty to one who comes upon them as a mere licensee, but as a rule a licensee upon premises takes the premises as he finds them, and the owner is not obliged to take active measures to protect him from dangers incident to the ordinary use to which the premises are subject. *Hyatt v. Murray*, 101 Minn. 507, 509, 112 N. W. 881. This accident happened near the mill and upon the part of the ice least frequented. No duty was imposed upon defendant to erect barriers or to otherwise guard the hole. There being no evidence sufficient to sustain a verdict for plaintiff, judgment should have been given for defendant.

Judgment reversed.

---

## MIDWAY REALTY COMPANY v. CITY OF ST. PAUL.<sup>1</sup>

January 8, 1915.

Nos. 18,907—(136).

### **Finding sustained by evidence.**

1. The evidence justifies a finding that the tax certificates and tax deed, through which appellant claims title to the parcels of land in controversy, were derived from dealings in tax certificates and tax matters concerning the same land, and other lands, within the terms of a certain written contract made between appellant's grantor or assignor and two other persons in the name of one Covell.

### **Same.**

2. The finding is also sustained that the one who negotiated with the city of St. Paul to sell or exchange said parcels of land was authorized by the others interested therein to make the deal.

### **Specific performance—evidence.**

3. The city, having been permitted to go into possession under the contract and make valuable improvements upon the land, is now entitled to a

<sup>1</sup> Reported in 150 N. W. 615, 151 N. W. 142.

conveyance thereof, it being all the time ready and willing to perform according to contract. The reception in evidence of a preliminary written proposition to deal with the city, if error, was without prejudice.

Application to the district court for Ramsey county by the Midway Realty Co. to register title to certain land. The city of St. Paul in its amended answer set up an agreement with the applicant's grantor to purchase the premises in question, and prayed that if the title were registered it be registered for the use and benefit of the city of St. Paul, and if registered in the name of the applicant that it be registered subject to the agreement to convey the premises to the city free from incumbrances. The matter was tried before Catlin, J., who made findings and as conclusion of law found that applicant was the holder of the legal title to the real estate, subject to the rights of the city of St. Paul in and under the contract of purchase, and other enumerated liens. From an order denying the motion of the applicant for a new trial, the Midway Realty Co. appealed. Affirmed.

*William G. White*, for appellant.

*O. H. O'Neill and J. P. Kyle*, for respondent.

HOLT, J.

This is a proceeding to register title to land. The applicant was found to be the holder of the legal title subject to a contract under which the city of St. Paul, upon the payment of \$750 and the delivery of a deed to certain lots, will become the owner and entitled to a deed from the applicant. Certain assessments and tax liens held by the city were declared superior to the legal title of the applicant. Of this there is no complaint, if the asserted contract of the city be sustained. The land in question is located in the north half of a block in the city of St. Paul, which block is bounded by Beech street on the north, by Frank street on the east, by Margaret street on the south, and by Earl street on the west. The site of Sibley school takes in the east third of the block. The south half of the remainder is platted into ten 40-foot lots, fronting on Margaret street; and the north half thereof, fronting on Beech street, is the property involved,

with the exception of a 40-foot strip known as the Kromschroeder lot which separates this land into two parcels, the east parcel having a frontage of 120 feet on Beech street and the west parcel a frontage thereon of 240 feet. The whole amount would make 9 lots, 40 feet front by 139 feet deep. By this appeal from the order denying the applicant a new trial nearly all the findings, 22 in number, are attacked. However, it all centers upon those leading to the conclusion that the city has an enforceable contract for the purchase of the parcels described. We shall not attempt to fully detail the facts, but rest content with reciting so much of the important features of the case as, in our view, control the result.

In 1906, when about to acquire a large number of tax certificates, and tax receipts and deeds, for various years, upon sundry lots and parcels of land in Ramsey, and three adjoining counties, Robert L. Ware made an agreement with Charles L. Covell, whereby, in consideration of \$4,522.53 to be paid on or before three years from November 15, 1906, he bargained, sold, conveyed and assigned the same to Covell. A description of the lots and parcels to which the certificates, deeds and receipts pertained was contained in a schedule attached to the agreement. The agreement or contract is herein referred to as Exhibit 6. It is evident that the intention was that the purchase price was expected to be paid out of what might be realized from these tax matters, for Covell agreed to reduce the certificates to cash, to free the several parcels from adverse liens, to quiet title and to register the title to the tracts wherein it was quieted. There was no personal obligation to pay the several specified amounts, except as made out of the tax matters. An examination of the schedule indicates that the sum to be paid Ware was but 60 per cent of the amount then due upon the certificates, or upon the amount to be realized if redemption was made. The contract contained a provision under which Ware was to retain possession of the certificates, etc., as a lien or security for the payment of the purchase price mentioned. Covell had also the privilege to substitute other certificates, not here important perhaps, and to secure the release of any one parcel upon payment of the amount due thereon with 6 per cent interest. This amount was 60 per cent of the amount indicated in

dollars and cents after each parcel on the schedule. Ware was given a first lien upon any and all proceeds of said certificates, and upon receipts and deeds, and upon all redemptions or sales of the same, and upon any lands or other property of whatsoever nature into which the same might be converted.

It was found by the court that in this contract, as well as in all dealings thereunder, Covell was a mere figure head, permitting A. M. Lawton and Lloyd Peabody to use his name, they being the ones who in reality contracted with Ware, and who, under the name of Covell, acted for themselves in all dealings in respect to the lands covered by the contract. This finding cannot be assailed.

In 1902 these parcels were sold to one Gaskell for the taxes of 1900. Whether the certificate thereon was superior to the certificates originally held by the Knowltons and received by Ware at the time Exhibit 6 was executed, does not appear and is unimportant. Gaskell in March, 1906, instituted an action against the then record owner of these parcels, and others claiming an interest therein, which terminated in a decree adjudging the title in Gaskell subject to the city's lien for local assessments. The real parties to Exhibit 6 by quitclaim from Gaskell to Covell acquired the benefit of the decree.

The taxes for 1906, and several prior years, being delinquent, Lawton and Peabody, acting under the terms of Exhibit 6 and with moneys realized thereunder, purchased from the state at a forfeited tax sale, held November 20, 1907, the parcels here involved, taking the certificates in the name of Ware, without his knowledge, but for the purpose of protecting themselves and as additional security to Ware under the contract. Thereafter Lawton and Peabody procured notice of redemption to be given, and, no redemption being made, obtained on September 30, 1909, the governor's deed to these parcels, causing the name of Ware to be inserted as grantee without his knowledge. The possession of this deed was always retained by Peabody until delivered to William G. White in December, 1911, and it was not recorded until later.

Prior to the execution of the Governor's deed, and on January 25, 1909, Lawton and Peabody began a proceeding to register the title to the parcels here involved in the name of Covell. This was pursu-

ant to the terms of Exhibit 6. The legal title was then of record in Covell. The proceeding was pending until this trial.

While the title in the register of deeds office thus appeared in Covell, and on October 4, 1909, Lawton, with Peabody's consent, began negotiating a deal with the city of St. Paul which was concluded on December 23, 1909, whereby the city agreed to acquire this land for public playgrounds and to pay therefor \$750 in cash, and deed some lots already owned by the city, but not as available for the intended use. The city went into possession of these parcels the next summer, graded them, and erected thereon a shelter house, all at the cost of several thousand dollars. The city, at all times since July 1, 1910, has had the actual, open and exclusive use of this land. The deal with the city, as finally accepted, also included the Kromschroeder lot, referred to above, and the 10 lots south of these parcels in controversy. The transaction has been fully carried out as to all the property except the parcels here in question. The city is ready and willing to perform as to them by paying the agreed price and delivering the deed to the lots to be traded in.

On December 18, 1911, Ware assigned and transferred his rights under the contract (Exhibit 6) to William G. White through whom the applicant claims. In so doing White agreed to hold Ware harmless from any consequences which might result from the assignment, and the latter agreed to execute such further and additional conveyance of the property as might be necessary to carry out the purpose of the assignment. Pursuant to this agreement, and at the request of White, Ware and wife, on February 20, 1913, quitclaimed to the applicant.

To us, but three vital propositions appear in the case, viz: Were the parcels in question covered by Exhibit 6? Was Lawton thereunder authorized to contract with the city? Has the city an enforceable contract?

The court finds that tax certificates upon the parcels involved were included in Exhibit 6. This is vigorously challenged. We think the finding right. Upon the schedule attached to the exhibit, and therein referred to as item 108, we find: "768 — Beech Street Property No. 65428 — \$654.67." It is possible this was overlooked by the attorneys at the trial. The parcels here in question front on Beech

street, and there is no evidence that any other tract of land on that street was covered by any tax certificate acquired by Ware. There is ample testimony that the tax certificates covering this property were among the instruments turned over to Ware, nominally, to Peabody, actually, when Exhibit 6 was executed. Under that contract, Lawton and Peabody were required to protect not only their own interests, but that of Ware against subsequent taxes; they were authorized also to clear the title, have it registered, and realize on the property. No matter how this was done as between Lawton and Peabody (in the name of Covell) on the one hand, and Ware on the other, Exhibit 6 determined their respective rights. Ware never gave these matters any attention. He trusted the others to look out for his interest. Peabody was a lawyer. He attended to all legal matters pertaining to the interests growing out of Exhibit 6. During all the time, and until the transfer to White, Peabody kept possession of all the certificates, receipts and other documents relating to all the property covered by the exhibit mentioned. No matter in what name the tax deeds, tax certificates, or the title appeared in any step taken in virtue of Exhibit 6 upon property embraced in it, as between the real parties to that contract, Lawton and Peabody on the one hand and Ware on the other, the latter had merely a lien or security thereon for the payment of the money the former were to pay. Whatever title or interest in the land was contained in the certificates, or which could ultimately be established through them, was in Lawton and Peabody under the provisions of the contract. Exhibit 6 was never terminated by any overt act of Ware, until long after the city had acquired its rights.

We also think A. M. Lawton was authorized by his associates to deal with the city. He was in the real estate business. His duty in the transactions relating to certificates or titles covered by the contract seems to have been that of sales manager. Peabody sanctioned the trade. The only doubt he now casts upon its being agreed to by all, is by his testimony that when he laid it before Ware, he seemed to find some objection, and that Peabody informed Lawton that it was necessary to obtain Ware's approval. The three without doubt conferred about it. Ware never positively disapproved. The

court has found, in substance, that Ware authorized or acquiesced in everything Lawton did in the premises. The finding is supported. Not only did Ware's contract give the other parties to it a wide latitude in converting the tax certificates into cash or into marketable titles, but whatever check the contract gave Ware upon their doings, he surrendered from the very first. He never took possession of a single certificate or document. Not only the certificates and instruments pertaining to the taxes upon the property included in the contract, but the contract itself, were always in Peabody's hands. Upon the trial Ware disclaimed any right to dictate what disposition should be made of any particular tract. All he looked for was that he should obtain from each lot or parcel the percentage of the amount indicated by the schedule as the tax lien thereon. He trusted to Peabody that nothing would be done in impairment of his lien or interest. It may also be held that the contract in effect created a sort of partnership between Lawton, Peabody and Ware in respect to the tax matters and titles therein included in which the management was left to Lawton and Peabody. And further it is not made to appear that the agreement with the city to any extent impaired Ware's lien or security. What his successor now obtains from the city may be more than the amount Ware was to have out of these two parcels.

Is the city in position to assert its rights to a conveyance under the arrangement made through Lawton? The city's power to buy the property for the use made of it is not questioned. But it is said the original proposition, Exhibit 8, from Lawton was not the one finally accepted; and that Exhibit 8 was rejected and no written proposition was proven of the deal as acceded to by the city. The contention has no merit. It is true that the city declined to proceed with the negotiations, unless it could acquire the whole block west of the school site. Lawton then assured the city that he could deliver the three lots not mentioned in Exhibit 8. This offer the city accepted. It has acquired all the lots except the tracts in controversy. The city was permitted to go into possession of these and has expended large sums in improving the same. It has always stood ready to complete the deal as agreed. *Brown v. Hoag*, 35 Minn. 373, 29 N. W. 135; *Mournin v. Trainor*, 63 Minn. 230, 65 N. W. 444; *Ferguson v. Tro-*

vaten, 94 Minn. 209, 102 N. W. 373. We think the other parties to the agreement, Lawton, Peabody and Ware, are not now in position to interpose the statute of frauds as a shield, and the doctrine of *ultra vires* does not apply. The applicant is in no better position than Ware. The city's possession and use of the premises has, ever since prior to July, 1910, been full constructive notice of its rights. Furthermore the agents and parties in interest with the applicant had actual notice. Peabody has still some interest with the applicant in the premises. It is true that the applicant in an action to quiet title has extinguished the rights of Covell in the property and thereby the interest of Lawton and Peabody. But the city was not a party to that suit, and its rights were in no manner affected.

A point is made against the reception in evidence of Exhibit 8, the written proposition under which the negotiations for the property started. The exhibit was one of the steps taken in the deal, it concerns the land in question. Whether it was rejected or merely modified is not now important for, after the city accepted the proposition, which as to these lands is exactly the same as in Exhibit 8, there has been possession with such part performance that the city may insist upon a deed, it being ready and willing to give the agreed consideration therefor.

Order affirmed.

HALLAM, J., took no part.

On March 1, 1915, the following opinion was filed:

PER CURIAM.

Upon the petition for reargument: Ware's contract cannot be classified as one between vendor and vendee for the sale of land. It provides that Ware shall have a "first lien upon any and all proceeds of said certificates and receipts and deeds, and upon all redemptions or sales of the same, and upon any lands, or other property of whatsoever nature, into which the same may be converted." Under this provision if title to any parcel of land covered by a tax certificate was perfected Ware had a first lien thereon for the amount of the

redeemable value of such certificate. We think the contract, especially in the light of the construction placed thereon by the subsequent acts of the parties, may well be said to partake largely of a partnership, as well as of an agency agreement, and only remotely, or in certain contingencies, does it concern title to land.

We believe it can be demonstrated that the contract, Exhibit 6, included tax certificates upon the property in dispute. The total of the amounts upon which the contract price was calculated, as shown upon the schedule A attached thereto, includes the \$654.67 upon the Beech street property. The trial court found that certificates upon this property were covered by the contract. Whether this was done without noticing this particular item of evidence does not matter, it is in the record and supports the finding. We may add as to Exhibit C, which plaintiff insists contains the true schedule in reference to which the parties contracted, that thereon is noted, in red ink, that from it certificates upon descriptions marked with a cross were transferred to the Schedule A annexed to the contract Exhibit 6. And upon Schedule A are the amounts of the redeemable value of the certificates upon each description of land also written in red ink. Sixty per cent of \$7,537.55, the totals including this \$654.67, is the exact amount which under the contract Ware was to receive. That this Exhibit 6 with attached Schedule A was the final contract covering all the tax matters is thus clearly proven not only by the signatures thereto but by the reference to it in Exhibit C and by the computation of the purchase price. We wish also to call the attorneys' attention to the handwriting of a deduction of \$148.58 at the end of Schedule A made by the same one who, it is insisted, used Exhibit C as the sole basis of the contract.

We see nothing in the proposition that as agent, partner, or a contracting party Lawton was disloyal to either Peabody or Ware in the deal with the city. The matter is sufficiently touched upon in the opinion. Under the provisions of the contract title might be perfected to any tract of land covered by a tax certificate, or, with Ware's consent, the certificate might be converted into other land, and thereupon Ware held a first lien thereon for the amount coming to him upon the certificate. For aught that appears Ware has an

ample lien in the \$750 and the lots the city is ready to turn over under its contract.

The city was in possession and this constituted notice to all the world of its rights. The right to a conveyance need not rest upon a formal contract on file with the proper city official. But we are satisfied that the agents and officers of the appellant had knowledge of the agreement Lawton made with the city, aside from the fact that the expensive buildings and improvements for playground purposes indicated plainly through what department the city's claim to the property could be fully ascertained.

Time was nowhere made the essence of the contract and it cannot be held that it terminated before the deal with the city was made.

The petition for re-argument is denied.

---

## FRANK KLINK v. VAL BLATZ BREWING COMPANY.<sup>1</sup>

January 8, 1915.

Nos. 18,926—(152).

### Action for rent — evidence.

1. Evidence in an action to recover rent *held* to establish the existence of the lease sued on.

### Surrender of premises.

2. Question of defendant's alleged surrender of the leased premises to plaintiff so as to terminate the lease, *held* properly submitted to the jury.

Action in the district court for St. Louis county to recover \$700. The case was tried before Hughes, J., who denied motions for a directed verdict in favor of each party, and a jury which returned a verdict for the amount demanded. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

*John A. Keyes*, for appellant.

*Archer & Pickering*, for respondent.

<sup>1</sup> Reported in 150 N. W. 398.

PHILIP E. BROWN, J.

Plaintiff had a verdict in an action to recover rent, and defendant appealed from an order denying a new trial.

It appeared that plaintiff leased his building to defendant for two years prior to July 7, 1912, at a monthly rental of \$75 per month. He claimed that about the time of the expiration of this lease he again rented the same premises to defendant for the term of one year at \$70 per month, the rental for the first two months being paid; and that defendant then vacated the premises without right and failed to pay the rent for the remainder of the term, for which a recovery was here sought and obtained. Defendant answered, denying all allegations of the complaint, "except such averments thereof as are hereinafter specifically admitted, qualified or otherwise explained"; denied being indebted to plaintiff; and averred that on or about August 20, 1912, it duly notified plaintiff "that it would surrender *said lease*", which notice was duly served, and, in effect, that it surrendered possession of the premises to plaintiff, who received and accepted the same. Plaintiff, in his reply, joined issue on these allegations.

Defendant now contends that there was no sufficient proof of the last-mentioned lease. It is very doubtful if any such issue was made by the pleadings; but, assuming otherwise, the evidence is quite clear that the contract was made and that the only defense related to the alleged surrender of the leased premises. Defendant's letters clearly indicated the existence of the lease, and also that defendant predicated its claim of right to cancel the same upon an alleged provision thereof, though it failed not only to offer the instrument in evidence but to produce it upon demand; nor did it establish any right to terminate or offer any evidence whatever in support of its claims, except such as was elicited on cross-examination of plaintiff. The court properly submitted the question of the alleged surrender to the jury, and further instructed them that, if they found in favor of plaintiff on that issue, he should recover either on the theory of the existence of the lease for one year or of a holding over under the first lease, without proper notice of termination. Defendant claims a variance in the latter regard between the complaint and the proofs, but no

such claim was made on the trial, and no exception was then or afterwards taken to the charge.

Defendant's assignments of error, except as stated, all relate to admission of testimony, and hence, in view of the conclusions reached above, are inconsequential.

Order affirmed.

---

**BARNEY BAUER v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>**

January 8, 1915.

Nos. 18,935—(158).

**Charge to jury — liability of master to car repairer.**

1. Plaintiff, a car repairer in the employ of defendant, was injured while adjusting a door upon a box car which had been placed in his department for repairs; it was claimed on the trial that the door was defective, in that the hinges holding it in place on the car were out of order, by reason of which the door fell upon and injured plaintiff; the negligence charged was the failure of defendant to provide plaintiff with a door in safe and suitable condition for use. Defendant claimed that it was plaintiff's duty to repair the door, if out of order, before attempting to place it in position on the car, and he was therefore not entitled to recover. It is *held* that the trial court erred in instructing the jury that defendant was under legal obligation to furnish a safe and suitable door, and in refusing a requested instruction that if the duty of repair rested with plaintiff he could not recover.

**Questions for jury.**

2. The question whether defendant was under obligation to furnish a safe door, and the question whether the duty of repair rested with plaintiff, were made issues of fact by the evidence, and should have been submitted to the jury.

Action in the district court for Isanti county to recover \$27,500 for injuries sustained while in the employ of defendant. The answer

<sup>1</sup> Reported in 150 N. W. 394.

alleged that if plaintiff sustained the injuries of which he complained, he sustained the same through his own carelessness and negligence and failure to exercise the care of an ordinarily prudent person for his own safety. The case was tried before Giddings, J., and a jury which returned a verdict in favor of plaintiff for \$1,255. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed.

*Cobb, Wheelwright & Dille*, for appellant.

*Thomas D. Schall, T. D. Sheehan and B. C. Thayer*, for respondent.

BROWN, C. J.

Action for personal injuries, in which plaintiff had a verdict and defendant appealed from an order denying a new trial.

Plaintiff was in defendant's employ as a car repairer at Great Falls, Montana. His duties consisted in repairing cars which had become defective and out of order from use on the road. He was under a foreman, who had general charge of the work, and was assisted by other workmen engaged in the same service. On the day of the injury of which he complains, and at the time thereof, he was, with his fellow workmen, engaged in putting a door in position upon a box car, which had been placed upon the repair track to be supplied therewith, when its fastenings suddenly gave way, causing the door to fall upon and injure plaintiff. The negligence charged in the complaint and relied upon at the trial was the alleged failure of defendant to provide a reasonably safe door, and one that was in repair and suitable to be placed upon the car; that the door in question was not suitable for the purpose, in that the hinges attached thereto and which held the door in position were loose and defective, by reason of which the door fell when the workmen supposed it had been properly attached to its fastenings. The defense to the action, in addition to the claim that no negligence on the part of defendant was shown, was that it was plaintiff's duty, as assistant car repairer, to do the work of repairing defective cars, and that this included the repair of defective doors as well as other parts of a car; that this duty imposed upon plaintiff and his fellow workmen the

further duty of inspecting and ascertaining whether a door intended to be placed upon a car was in safe and suitable condition for the purpose; and that, if the door in question was defective in the respect claimed, plaintiff was chargeable with neglect of his duty in attempting to use it without ascertaining its condition.

It appears from the evidence that freight-car doors frequently become out of order, and are removed and replaced by doors in good condition for use; others by reason of defective hinges holding them in position fall from moving trains along the road, and are gathered up by sectionmen and finally reach some repair division point on the line, where they are placed with other defective doors in the repair yards to be put in order by workmen engaged in that service. There is no controversy in the evidence upon this subject, the contested point on the trial being, as already stated, whether it was plaintiff's duty to repair such doors before placing them upon cars, or whether it was defendant's duty to provide him with a door in good condition for use.

The court charged the jury "that it was the duty of the railway company to furnish a door with which these men could supply that car, and as to that proposition the law of the case is simply this, and the court so instructs you, that it was the duty of the railway company to furnish this plaintiff and his associates with a door reasonably safe and suitable for the purpose for which it was to be used, to supply the defects in that car, which plaintiff says he was called upon to make. In order that you may clearly understand, I repeat: It was the duty of the master, the employer, in this case the railroad company, to furnish this plaintiff and his associates a door that was reasonably safe and suitable for the purpose for which it was designed."

To this instruction defendant excepted, and also excepted to the refusal of the court to instruct the jury that "if you find from the evidence that plaintiff and \* \* \* fellow workers on the car in question were in the defendant's employ as car repairers with duty to repair defective cars \* \* \* upon the repair tracks; \* \* \* that it was part of the duty of the plaintiff and his three associates to repair said car by fitting a door on said car from a supply

of second-hand car doors kept near by; that if the car door selected was not in proper condition to be used in said car it was the duty of the plaintiff and his said associates to repair the same and make it fit for use, and if you further find that said door fell while being placed in said car because of a defective hanger thereon, you are instructed that defendant is not liable."

The substance of this request was that if it was plaintiff's duty as a member of the repair crew to make proper repairs upon doors he was called upon to adjust to cars, and he failed in the performance thereof, he could not recover.

We think and so hold that, in view of the evidence and issues presented, heretofore referred to, the learned trial court erred not only in refusing this request, but also in stating to the jury that defendant was under legal obligation to provide plaintiff with a safe and suitable door for the purposes intended. The plaintiff claimed that defendant owed him that duty; defendant denied the existence of the obligation, and insisted that plaintiff, under his employment, was under the duty of repairing the door before placing it upon the car. In view of this clearly defined issue the jury should, under the evidence, have been permitted to determine whether the duty of repair rested with plaintiff or defendant. It was the contested issue on the trial and should have been submitted as a question of fact. And if, as contended by defendant, the duty of repair rested with plaintiff, and consequently to see that the door in question was in condition for use, he cannot profit by a neglect of that duty by a recovery against the company. While the court referred to this claim of defendant in its instructions, it was submitted to them on the theory that, if plaintiff failed to perform the duty so imposed upon him, it was for the jury to say whether such failure constituted contributory negligence on his part. It was not, strictly speaking, a question of contributory negligence. If the duty rested with plaintiff, and he failed of performance, that is an end of the case and his action fails. If it was his duty to repair, then there was no negligence on the part of defendant in furnishing it to him in a defective condition, for, had it not been defective, it would not have reached plaintiff's department of the service. The theory of the court

would have been correct had it appeared without dispute that it was the duty of the company to provide a safe door, one in proper state of repair, for in that case plaintiff could recover, unless he was chargeable with contributory negligence in not timely discovering the defect of which he complains. The question of contributory negligence is important only in this view of the case. But the question whether defendant was under obligation to furnish a safe door, one in proper condition for use, was in issue by the evidence, and the jury should have been permitted to determine whether it rested with defendant, or by his employment was cast upon plaintiff. For this error, which is substantial, there must be a new trial.

Order denying new trial reversed.

---

**ALBERT H. SCHUETTE v. CHRISTIAN SUTTER.<sup>1</sup>**

January 8, 1915.

Nos. 19,019—(118).

**Obstruction of ditch—evidence.**

1. Under the evidence the plaintiff had a right by prescription and by way of estoppel to the use of a ditch on the defendant's land; and the finding that the defendant did not obstruct said ditch was not justified by the evidence.

**Same—Injunction.**

2. Upon the obstruction of such ditch the plaintiff was entitled to injunctive relief.

**Specific performance—judgment erroneous.**

3. The plaintiff was not entitled to specific performance of the defendant's agreement to construct a system of tile drainage upon his land in place of the system of open drainage; the action was not one for specific per-

<sup>1</sup> Reported in 150 N. W. 622.

---

Note.—As to estoppel to revoke license to maintain burden on land after licensee has incurred expense in reliance thereon, see notes in 19 L.R.A.(N.S.) 700 and 25 L.R.A.(N.S.) 727.

formance, nor was it tried as such, nor was relief appropriate to such action given, and the judgment was erroneous.

Action in the district court for Waseca county to require defendant to remove and abate an obstruction in a ditch to the natural flow and drainage of water from plaintiff's land, and for \$200 damages. The facts are stated in the opinion. The case was tried before Childress, J., who made findings and ordered judgment that plaintiff was entitled to have the tiled ditches finished so as to touch his land and when constructed defendant should be entitled to recover \$44.98, and defendant was entitled to have certain tiling extended to the point mentioned. From the judgment entered pursuant to the order for judgment, and from the order of the court on the appeal from taxation of costs and disbursements by the clerk of court, plaintiff appealed. Reversed.

*Moonan & Moonan*, for appellant.

*Sawyer & Sperry*, for respondent.

DIBELL, C.

This action was brought to compel the defendant to abate and remove the obstruction to the flow of water through a drain upon his land, and for damages. By the judgment entered it was determined that the plaintiff was entitled to have certain tile drains upon the land of the defendant extended to his land; that the defendant was entitled to have a certain tile drain on the plaintiff's land extended to his land; that the defendant was entitled to judgment against the plaintiff for certain sums which the plaintiff had agreed to pay as a part of the cost of construction of the tile drains on defendant's land; and that the defendant have judgment for his disbursements. The plaintiff appeals from the judgment.

1. The plaintiff owns the southwest quarter and the defendant owns the northwest quarter of a section of land in Waseca county. There is a slough covering a portion of the two quarters into which the surface waters drain, the lowest portion of which is very near the quarter line between the two, perhaps a little south of it. For many years, and as far back as 1877, a ditch ran from plaintiff's

land into the slough, and out of the slough through the defendant's land was a drain to the north and east through a natural watercourse. The plaintiff did work in keeping the ditch through the defendant's quarter in condition for taking care of the waters which came into the slough, he and the defendant co-operating in maintaining a ditch for the drainage of their lands, and for all these years there was no trouble or controversy. The plaintiff had a prescriptive right to drainage across the defendant's quarter. *Baldwin v. Fisher*, 110 Minn. 186, 124 N. W. 1094, and cases cited. He also had the right of drainage by estoppel within the doctrine of *Munsch v. Stelter*, 109 Minn. 403, 124 N. W. 14, 25 L.R.A. (N.S.) 727, 134 Am. St. 785.

In June, 1910, the plaintiff and the defendant agreed to substitute a system of tile drainage for the open drainage, the plaintiff to pay a part of the cost of it. The main tile drain was to start at the low part of the slough at the quarter line following the old ditch to the north and east off the defendant's land. From this main drain a branch drain was to run south to the quarter line at a point some distance easterly of the starting point of the main drain. The court states in its memorandum, and the evidence supports it, though it is not specifically found, that a tile drain was to extend easterly along the quarter line from the point of its intersection with the branch ditch. To this point of intersection the plaintiff was to extend a tile drain which was upon his quarter.

The tile drain was not constructed by the defendant as agreed. The main drain did not reach the quarter line by some 18 or 20 feet. The branch drain did not reach the quarter line by some six or eight rods. The plaintiff claims that the defendant filled in and obstructed the old ditch at the 18 or 20 foot space mentioned. The court found that he did not. Upon a careful review of the evidence we think that it must be held that he did. There was throughout an unconcealed purpose on the part of the defendant to prevent the plaintiff making beneficial use of the tile drainage. Although the court found to the contrary, and while not particularly important here, the evidence is quite cogent that the defendant ploughed his

land to the east along the quarter line to prevent the surface waters coming from the plaintiff's land.

2. If the defendant failed to construct the substituted tile drainage the plaintiff was entitled to the use of the old ditch; and if the defendant filled in the southerly 18 or 20 feet of it, or otherwise obstructed the plaintiff's right to the flow of water through it, the plaintiff was entitled to injunctive relief. *Baldwin v. Fisher*, *supra*; *Munsch v. Stelter*, *supra*; *Mueller v. Fruen*, 36 Minn. 273, 30 N. W. 886.

3. The court found that the plaintiff was entitled to have the main ditch and the branch ditch extended to the agreed points. We are not able to see that specific performance could be enforced of this parol agreement to construct a tile drainage system to take the place of the open drainage. *Robinson v. Luther*, 134 Iowa, 463, 109 N. W. 775. The case was not an action for specific performance, nor was it tried as such, nor was relief by way of specific performance given. If it were an action for specific performance, the plaintiff was the prevailing party, and was entitled to disbursements, and the judgment was wrong in giving them to the defendant; and the defendant was not entitled to judgment against the plaintiff for his agreed portion of the cost of construction of the drain so long as it remained uncompleted.

Judgment reversed.

---

RED RIVER POTATO GROWERS ASSOCIATION v. J. W.  
BERNARDY and Others.<sup>1</sup>

January 8, 1915.

Nos. 19,078—(57).

**Contempt—right of appeal.**

1. From an order imposing punishment for civil contempt there is a right

<sup>1</sup> Reported in 150 N. W. 383.

---

Note.—On the question whether proceeding for contempt for violation of an injunction is civil or criminal, see notes in 13 L.R.A.(N.S.) 591; 34 L.R.A.(N.S.) 874, and 42 L.R.A.(N.S.) 793.

of appeal. From an order imposing punishment for criminal contempt there is no right of appeal.

**Civil contempt — annulment of order.**

2. A proceeding in civil contempt is one instituted in a civil action for the benefit of a party to the action, and where punishment is imposed it is remedial, and is imposed for the benefit of the party and to aid in the enforcement of his rights. The contempt proceeding being in aid of the enforcement of the order disobeyed, it falls with the annulment of that order.

**Criminal contempt — annulment of order.**

3. A proceeding in criminal contempt is one instituted for the sole purpose of penalizing the defendant. Its purpose being public, an order punishing a person for criminal contempt does not fall on account of irregularity of the order disobeyed, unless the court was without jurisdiction to make it.

**Fines revoked by reversal on appeal.**

4. Orders in this case imposing fines to be paid to the plaintiff were orders in civil contempt, and, since the order disobeyed was reversed on appeal, the orders imposing the fines must also be reversed.

**Violation of injunction.**

5. Orders imposing simple fines for contempt of court in violating an injunction, where the forbidden acts have been wholly performed and cannot be recalled, are orders in criminal contempt.

Appeal by defendants from four judgments of the district court for Clay county, Nye, J., adjudging them guilty of contempt of court. Remanded with direction to proceed in accordance with the opinion.

*Leonard Eriksson*, for appellant.

*F. H. Peterson*, for respondent.

HALLAM, J.

This case comes before this court on appeal from certain orders or judgments punishing the defendants for contempt of court.

Early in 1913, plaintiff association engaged in business at Barnesville, Minnesota, in marketing the potatoes of its stockholders. Defendant Cary was its president and was in charge of the business. In July, 1913, Cary resigned. During the fall of 1913, Cary and Bernardy conducted a business of handling potatoes. Whether the business they so conducted was the business of the association or of

these defendants, the trial court has not decided. Plaintiff claims it was not its business, but that defendants used the name of plaintiff in such manner that claims have been presented against plaintiff arising out of that business and upon which plaintiff may be obliged to respond. In February, 1914, plaintiff commenced action for the appointment of a receiver to take charge of all the property, assets and effects of the business conducted by defendants during the period from August, 1913, to January 13, 1914, including potatoes in a certain warehouse. The court made an interlocutory order appointing a receiver, and therein ordered defendants to deliver to such receiver all books, papers and vouchers in any way connected with the conduct and operation of said business, and all of the potatoes in said warehouse. This order was subsequently reversed by this court. (126 Minn. 440, 148 N. W. 449). In the meantime, however, the receiver had demanded possession of said property, such demand had been refused, and plaintiff had instituted proceedings to punish defendants for contempt of court. The trial court found as a fact that at the time of such demand and refusal the defendants had in their possession or under their control certain of the books, papers and vouchers covered by said order, and also the potatoes in said warehouse, and adjudged the defendants in contempt and adjudged that defendant Cary "pay a fine of \$50 as costs to assist in paying plaintiff's witnesses and attorney's fees herein" and that defendant Bernardy "pay a fine of \$50, and in addition thereto the amount of \$75 as costs to assist in paying plaintiff's witnesses and attorney's fees herein."

Some time later the court made another order enjoining defendants from removing or interfering with the potatoes in said warehouse. This order defendants disobeyed by loading some of the potatoes upon cars for shipment out of the state. Upon a second proceeding to punish the defendants for contempt of court, the court again adjudged them in contempt and adjudged that they each pay a fine of \$75. Defendants appeal from all of the judgments.

It is important to determine whether these are proceedings in civil or criminal contempt. From an order imposing punishment for civil contempt there is a right of appeal. *State v. Willis*, 61 Minn. 120,

63 N. W. 169; *Deppe v. Ford*, 89 Minn. 253, 94 N. W. 679. From an order imposing a punishment for criminal contempt the legislature has provided no right of appeal. *State v. Leftwich*, 41 Minn. 42, 42 N. W. 598; *State v. Willis*, 61 Minn. 120, 63 N. W. 169.

A proceeding in civil contempt is one instituted in a civil action for the private benefit of a party to the action, and where punishment is imposed it is remedial and is imposed for the benefit of the party and to aid in the enforcement of his alleged rights. Being part of the proceedings in the civil action, the contempt proceeding falls with the dismissal of the action and with any termination of it adverse to the party instituting the contempt proceeding. It falls too with the reversal or other annulment of the order disobeyed. The reason for this is obvious. The contempt proceeding, being in aid of the enforcement of such order, it can have no life or vitality after the order to be enforced has been annulled. *Worden v. Searls*, 121 U. S. 14, 7 Sup. Ct. 814, 30 L. ed. 853; *Gompers v. Bucks Stove & Range Co.* 221 U. S. 418, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L.R.A.(N.S.) 874.

A proceeding in criminal contempt is one instituted for the sole purpose of penalizing the defendant. Its purpose is public and it is resorted to to maintain and vindicate the authority of the court and to secure the orderly conduct of court procedure. A proceeding in criminal contempt does not fall because of the irregularity of the order disobeyed, or with any termination of the action or proceeding of which it is a part, unless the court was without jurisdiction in the premises and for that reason the order was entirely void, for the proceeding, being public in its nature, is in no sense dependent on the disposition by the parties of the private controversy between themselves. *Elwell v. Goodnow*, 71 Minn. 383, 73 N. W. 1092.

The same act of disobedience may have a double aspect. It may warrant punishment both for civil and for criminal contempt, that is, it may warrant an order in aid of the rights of the other party and also an order to establish and vindicate the authority of the court as well. This situation frequently arises in cases where a defendant in divorce has disobeyed an order requiring the payment of ali

mony. In re Fanning, 40 Minn. 4, 41 N. W. 1076; State v. Willis, 61 Minn. 120, 121, 63 N. W. 169.

Coming now to the orders made in this case, it is clear that the orders in the first contempt proceeding are orders punishing the defendants for civil contempt. In the case of Cary, all, and in the case of Bernardy, the major part, of the penalty imposed was for the benefit of the plaintiff in the action. The orders were accordingly appealable, and it must be held that the contempt proceeding fell with the reversal of the order which was disobeyed. The orders now appealed from must, therefore, be reversed.

The orders in the second proceeding are of a different character. By their terms they impose a simple fine for contempt of court. This form of order would indicate that the proceeding is in criminal contempt, but the form of the order is not conclusive. If in fact the act is wholly the disobedience, by one party to a suit, of a special order made in behalf of the other, and the order disobeyed may still be obeyed, and the purpose of the punishment is to aid in the enforcement of obedience, the proceeding, notwithstanding its form, is in fact a proceeding in civil contempt. *Gompers v. Bucks Stove & Range Co.* 221 U. S. 418, 31 Sup. Ct. 492, 55 L. ed. 797, 34 L.R.A. (N.S.) 874; *Deppe v. Ford*, 89 Minn. 253, 94 N. W. 679. But where the forbidden act has been wholly performed and cannot be recalled, then the act is a mere contempt of the court rather than a disregard of the rights of the adverse party, the punishment in contempt can have no remedial aspect, and the proceeding becomes in its nature criminal. *State v. Bland*, 189 Mo. 197, 212, 88 S. W. 28, 3 Ann. Cas. 1044; *Gompers v. Bucks Stove & Range Co.* supra. The second proceeding is of this character. The order enjoined interference with certain property. Defendants interfered. The act had been done. The order could no longer be obeyed. The punishment had no civil or remedial aspect, but was essentially criminal. The proceeding being one for criminal contempt, the orders or judgments are not appealable, and the appeals therefrom are dismissed. The only remedy of defendants was by *certiorari*.

Case remanded with direction to proceed in accordance with this opinion.

FRANK A. JOHNSON v. PETER NELSON.<sup>1</sup>

January 8, 1915.

Nos. 19,156—(301).

**Workmen's Compensation Act of Wisconsin — servant's right to compensation.**

Plaintiff on April 2, 1913, entered defendant's employ upon railroad construction work. He worked at two different places in this state. On June 26 the same year he was asked to go to Wisconsin on similar work there being done by defendant. He accepted, and was injured four days thereafter. His original hiring was for no definite time and for no particular place. On June 10 defendant had elected to accept the provisions of the Workmen's Compensation Act of Wisconsin. In this action to recover damages for the injury, alleged to have been caused by defendant's negligence, it is *held*:

(1) That plaintiff's right to damages or compensation depends upon the law of Wisconsin where the injury was received.

(2) The defendant being under the act when plaintiff was requested to go to work in Wisconsin, the latter also elected to accept the provisions of the act, since he failed to give written notice to the contrary. The contract of hiring, as referred to in the Wisconsin act, must be considered made when the employment in Wisconsin was accepted.

(3) Plaintiff cannot plead ignorance of the laws of the state wherein his employment was performed, and under which alone his right to redress for the injury must be asserted.

Action in the district court for Hennepin county to recover \$50,000 for personal injuries received while in the employ of defendant. Defendant's motion for judgment in its favor on the pleadings was granted by Hale, J. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

<sup>1</sup> Reported in 150 N. W. 620.

---

Note.—On the question of conflict of laws as to actions for death or bodily injury, see note in 56 L.R.A. 193.

As to the constitutionality of workmen's compensation acts, see notes in 34 L.R.A.(N.S.) 162 and 37 L.R.A.(N.S.) 466.

*Larrabee & Davies*, for appellant.

*John Junell and Cohen, Atwater & Shaw*, for respondent.

HOLT, J.

A judgment, rendered in defendant's favor upon the pleadings, is assailed by this appeal. The complaint states facts entitling plaintiff, a servant, to damages against his master, the defendant, for injuries sustained in the employment because of the latter's negligence. The injuries were received on June 30, 1913, while plaintiff was working near Owen, in the state of Wisconsin, at railroad construction in which defendant was there engaged. The answer alleged that at the time of the injury, and long prior thereto, there was in force in the state of Wisconsin a statute known as the "Workmen's Compensation Act"; that both plaintiff and defendant were under the act, defendant having duly elected to accept its provisions on June 10, 1913, and that plaintiff, who was not employed for the work until June 26, 1913, and did not begin his services until June 29, 1913, elected to accept in that he failed to give written notice that he would not; that hence plaintiff's sole remedy for the injuries received is under the provisions of that act; and that defendant is ready and willing to pay all sums and perform everything therein demanded. The reply admitted the law of Wisconsin as alleged in the answer, also that at the time therein stated defendant placed himself thereunder, and that plaintiff did not begin his service in the state of Wisconsin until June 29, 1913. He further averred that during the summer months of 1912 he worked for defendant in railroad construction, but when he quit late in the fall nothing was said as to work next year; that on the first of April, 1913, plaintiff met defendant in the city of Minneapolis, Minnesota, and was requested to again enter upon the same kind of work near that city, nothing being said as to how long, or at what wages, he should work; that he began work the next day and continued until it was done, and then was sent, with other men, to northern Minnesota where he did like work until about June 26, 1913, when defendant told plaintiff to go to Owen, Wisconsin, and work under the son of defendant, which he did, beginning there June 29; that he received wages for every working day from April 2,

1913, up to and including the day of the accident, and also his transportation from place to place; and that plaintiff had no knowledge of this Wisconsin statute prior to his injury.

Plaintiff insists that the Workmen's Compensation Act of Wisconsin does not apply to this case, because he had not placed himself thereunder, either by written notice or by remaining in the service for 30 days after the defendant accepted its provisions. The part of the act involved in this suit reads: "Section 2394-8. Any employee as defined in subsection 1 of the preceding section shall be subject to the provisions of sections 2394-1 to 2394-31, inclusive. Any employee as defined in subsection 2 of the preceding section shall be deemed to have accepted and shall, within the meaning of section 2394-4, be subject to the provisions of sections 2394-1 to 2394-31, inclusive, if at the time of the accident upon which liability is claimed:

"1. The employer charged with such liability is subject to the provisions of sections 2394-1 to 2394-31, inclusive, whether the employee has actual notice thereof or not; and

"2. Such employee shall not, at the time of entering into his contract of hire, express or implied, with such employer, have given to his employer notice in writing that he elects not to be subject to the provisions of sections 2394-1 to 2394-31, inclusive, or, in the event that such contract of hire was made in advance of such employer becoming subject to the provisions of sections 2394-1 to 2394-31, inclusive, such employee shall have given to his employer notice in writing that he elects to be subject to such provisions, or, without giving either of such notices, shall have remained in the service of such employer for 30 days after the employer has filed with said board an election to be subject to the terms of sections 2394-1 to 2394-31, inclusive."

It is argued that the contract of hiring, whether made April 2 or June 26, 1913, was made in this state, and the duties and obligations of the parties are governed by our law unaffected by that of Wisconsin. Viewing plaintiff's rights based upon defendant's duties as employer, from a contract standpoint alone, this is not true. The general rule as to law of contracts is that "as to matters pertaining

to the performance of contracts the laws of the place of performance govern." 1 Dunnell, Minn. Dig. § 1532; *Ames v. Benjamin*, 74 Minn. 335, 77 N. W. 230. But, although plaintiff's cause of action is predicated upon his relation of a servant to defendant, and the latter's obligations as master, it is, nevertheless, one in tort. As to such actions the law is well settled that the liability, or right of action, is determined by the law of the place where the injury is inflicted, without regard to the law of the forum or the law of the place where the contract was made. *Herrick v. Minneapolis & St. L. Ry. Co.* 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771; *Njus v. Chicago, M. & St. P. Ry. Co.* 47 Minn. 92, 49 N. W. 527; *Brunette v. Minneapolis, St. P. & S. S. M. Ry. Co.* 118 Minn. 444, 137 N. W. 172; *Northern Pac. Ry. Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. ed. 958; *Cuba R. Co. v. Crosby*, 222 U. S. 473, 32 Sup. Ct. 132, 56 L. ed. 274, 38 L.R.A.(N.S.) 40; *St. Louis, I. M. & S. Ry. Co. v. Brown*, 67 Ark. 295, 54 S. W. 865; *Hyde v. Wabash, St. L. & P. Ry. Co.* 61 Iowa, 441, 16 N. W. 351, 47 Am. Rep. 820; *Bruce's Adm'r v. Cincinnati Ry. Co.* 83 Ky. 174; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 South. 53; *Burns v. Grand Rapids & I. Ry. Co.* 113 Ind. 169, 15 N. E. 230; *Pendar v. N. & B. Am. Machine Co.* 35 R. I. 321, 87 Atl. 1. In the case of *Cuba R. Co. v. Crosby*, supra, it is said: "With very rare exceptions the liabilities of parties to each other are fixed by the law of territorial jurisdiction within which the wrong is done and the parties are at the time of doing it." And in *Burns v. Grand Rapids & I. R. Co.* supra, we find: "All cases agree that whatever the law of the forum may be, the plaintiff's case must stand, if at all, so far as his right of action is concerned, upon the law of the place where the injury occurred. Unless the alleged wrong was actionable in the jurisdiction in which it was committed there is no cause of action which can be carried to and asserted in any other jurisdiction." This eliminates from consideration the law of the place where the contract of employment was made in determining what redress plaintiff may have for the injuries received when working for defendant in Wisconsin. Plaintiff must resort to the law as it is in that state to find his right to relief.

The state of Wisconsin by the Workmen's Compensation Act  
128 M.—11.

permits the employee and employer to renounce the remedy given by the common law for injuries received by the servant in the course of the employment, and to accept in lieu thereof the compensation provided under the act. So far the act has withstood the assaults made upon it. *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209, 37 L.R.A.(N.S.) 489. This decision we should apply insofar as it determines the questions raised herein. We also have sustained a law of like character. *Mathison v. Minneapolis Street Ry. Co.* 126 Minn. 286, 148 N. W. 71. These two decisions answer the arguments advanced against the constitutionality of this and similar legislative acts affecting the common-law remedy of a servant for injuries suffered through the master's negligence.

Eighteen days prior to the time plaintiff came to Wisconsin and there began his work, defendant elected to accept the provisions of the compensation act. The question then is whether, under that part of the law above set out, it must be held that plaintiff also had accepted. It seems to us that the status of the employer in respect to the act at the time the employee enters the service in Wisconsin, determines what action the latter must take. If at that time the employer is within the act, the employee must then elect, and is held to have accepted, unless written notice to the contrary is given. Knowledge of the employer's election to accept is conclusively imputed to all employees. Section 2394-29 of the act. And considering the contract of hiring in this case, as set out in the reply, we reach the conclusion that plaintiff, by failing to give written notice of nonacceptance when he entered the service in Wisconsin, accepted the provisions of the act. The employment was for no definite period. When plaintiff, on June 26, 1913, was requested to go to Wisconsin, he was free to accept or refuse. Had he refused, no existing contract between the parties would have been breached. Nor would there, had plaintiff then been discharged. Therefore when he agreed to go, it was in reality a new hiring for that work. That was the first time plaintiff was in position to choose between the two remedies open to him in Wisconsin, in case he, in his contemplated employment, should meet with an injury. The contract of hire, referred to in the statute quoted

above, must mean an agreement to work in Wisconsin, where the law applies.

But it is said, the reply alleges that plaintiff had no knowledge of the law of Wisconsin, especially the statute law. Since plaintiff must plant his right to recover upon the laws of that state, we do not think he can plead ignorance of either the statutory or the common law, as there administered, which may affect such right. A person is presumed to know and understand the law of the state wherein he transacts business. These cases so hold: *Bentley v. Whittemore*, 18 N. J. Eq. 366; *Dank v. Spalding*, 9 N. Y. 53; *Hill v. Spear*, 50 N. H. 253, 9 Am. Rep. 205. In criminal cases ignorance of the law excuses the foreigner no more than the citizen. It cannot be possible that the laws of any state will permit a discrimination against its own inhabitants as regards remedies for personal injuries, or make such remedies dependent upon knowledge or ignorance of the law on that subject.

The trial court ruled rightly that the sole remedy open to plaintiff is now to be found in the provisions of the Wisconsin Workmen's Compensation Act.

Judgment affirmed.

---

## STATE v. JAMES McLARNE.<sup>1</sup>

January 15, 1915.

Nos. 18,527—(2).

**Criminal law—conviction based on confession.**

1. Our statute provides that a confession of defendant shall not be suffi-

<sup>1</sup> Reported in 150 N. W. 787.

---

Note.—The general question of *corpus delicti* in arson is treated in a note in 16 L.R.A. (N.S.) 285. And upon the proof of *corpus delicti* in arson, see note in 68 L.R.A. 41, 49, 55, 69, 71, 78.

cient to warrant his conviction without evidence that the offense charged has been committed.

**Arson — evidence insufficient.**

2. The *corpus delicti* in arson, the crime of which defendant was convicted, requires proof not alone of the fact that the building burned but also that the fire originated through criminal agency. Excluding the claimed admissions or confessions of defendant, the evidence is insufficient to prove that the crime of arson was committed.

Defendant was indicted by the grand jury of Le Sueur county, tried in the district court for that county, convicted of the crime of arson, and sentenced to the State Prison for a term not to exceed seven years. From an order, Morrison, J., denying his motion for a new trial, defendant appealed. Reversed and new trial granted.

*Charles C. Kolars* and *Thomas J. McDermott*, for appellant.

*Lyndon A. Smith*, Attorney General, *John C. Nethaway*, Assistant Attorney General, and *Francis J. Hanzel*, County Attorney, for respondent.

HOLT, J.

In February, 1913, defendant was convicted of the crime of arson. He is now serving the sentence imposed. The appeal is from the order denying a new trial, and involves but one assignment of error, namely, that the verdict of guilty is not justified by the evidence.

At about 11 o'clock on the night of July 6, 1911, fire was discovered in a barn on the farm of Adna Pettis, located 2½ miles southeast of St. Peter, Minnesota. About one year thereafter defendant was indicted on the charge that he set the fire. The following facts give a setting to the case: Less than a year prior to July 6, 1911, defendant drifted into the farming community near St. Peter. He was about 35 years of age. He worked for and paid court to a widow upwards of 82 years old, who lived upon and owned a 40-acre farm, nearly a mile west of Pettis' barn in a direct line. This widow was the mother of Mrs. Pettis. Mr. Pettis was not then living with his wife. Mr. Pettis opposed defendant's intended marriage, how vigorously does not appear. Another married daughter of the old lady, a Mrs. Deubler, with her two grown children, a son and daughter

arrived from Texas in June to pay the mother and grandmother a visit—the first one the daughter had made to her mother in 50 years. Reading between the lines, it might be inferred that they came in response to a message from Adna Pettis, for the purpose of defeating defendant's matrimonial scheme. But it seems that they arrived so late that their efforts, if any, were futile, for defendant was married on June 15. So far as disclosed by the record there was no bad feeling between Adna Pettis and defendant subsequent to the marriage and prior to the destruction of the barn. In fact, whenever they met in town they treated each other and observed the usual courtesies of friends and relatives. Defendant's newly acquired daughter from Texas and her daughter stayed at defendant's house, and Mrs. Pettis also came there and visited her mother and half-sister, Mrs. Deubler. The Deubler visit was not enjoyed, for on July 7 defendant told Mrs. Deubler and her daughter that he did not desire any "Texas trash" in the home, and his wife seemed equally emphatic in her wish that this daughter and her children should not again darken her doors. In the quarrel on July 7 Mrs. Deubler openly accused defendant of setting fire to the barn. The next day she and her children departed for Texas. Young Mr. Deubler was stopping with Adna Pettis, and on the afternoon of the seventh of July he was seized with a desire to do detective work, and explored a cornfield, lying between defendant's home and the barn, for tracks. He did not look for tracks in any other direction. At the time of this trial there were pending two actions instituted against defendant and his wife by Adna Pettis, as administrator of the estate of Mrs. Pettis, she having died some time after the barn was destroyed. The purpose of the actions, as far as disclosed, seems to be to deprive defendant's wife of the 40-acre tract upon which was the home and also to acquire some of the personal property which the old lady and defendant claimed to own.

Pettis' barn was but a few feet from a much traveled road. It had wide doors opening thereon, so that loads could be driven right in on the floor. One load of hay had been driven in, and the fire was first discovered about 11 o'clock in this hay by a person passing on a bicycle, and the alarm given. Mrs. Deubler and her daughter

testified that it was after half past ten when they went upstairs to their bedroom in defendant's home on the evening in question. That about 15 minutes thereafter, and before retiring, they saw defendant pass from his bedroom, past their door, and downstairs, with his shoes in his hands; that they heard the door slam downstairs; and that he walked away upon a plank below their window in the direction of the barn. They did not hear him return. Mrs. Pettis was then in the front room downstairs. Young Mr. Deubler, and those whom he called to notice the tracks in the cornfield, testified that they found tracks of a number 7 or  $7\frac{1}{2}$  shoe going westerly from the direction of the barn towards defendant's home, and also the same kind of tracks going easterly and about a few rods distant from the first. The cornfield was some little distance from the road and barn. No other tracks were found by them, except the imprint of one shoe in a meadow nearer defendant's house, but about half a mile therefrom. Defendant testified that he never wore a larger shoe than a six and he exhibited the shoe to the jury. Two other persons testified that, in hurrying to the fire that night, they crossed the same cornfield not far from where Deubler stated he found the tracks. So far the evidence is of the flimsiest kind, altogether insufficient either to prove that a crime was committed or to connect defendant therewith.

One Swenson, a hotel keeper at St. Peter, testified that in the latter part of June, 1913, he met defendant, who accounted for his dressed-up appearance by stating that he was just married. The two struck up a gossip conversation, wherein Swenson asked defendant if he knew Adna Pettis, reputed to be well fixed. Defendant answered that he knew him very well, and afterwards in the talk said Pettis' "wealth might be reduced to a certain extent before long." That after the fire Swenson again saw defendant across the street in St. Peter, and he came over, on Swenson's motioning to him. Swenson then spoke thus: "You seems to be wise; that happens what you said." The defendant answered: "I told you it might happen." There is also a statement made by defendant, almost a year after the fire that Adna Pettis was his enemy.

Then there is an alleged admission testified to by Adna Pettis and his son. It seems that some time in June, 1912, Adna Pettis em-

ployed one Kaveny, who had been on the police force in Minneapolis, to obtain evidence against defendant. Kaveny apparently got into the good graces of defendant, drank and visited with him. On the evening of June 29, Pettis and son were in St. Peter, so were Kaveny and defendant. They all had drinks together. About 11 o'clock Pettis and his son were going into the saloon for more beer when they saw Kaveny and defendant coming around the corner. The former stepped into a dark alley for the purpose of hearing the conversation of the detective and defendant. Defendant's horse was tied near the sidewalk by the alley. As the horse was being untied by Kaveny, the father and son testified to hearing the defendant say to the detective: "The neighbors are telling me that you are a detective, and my wife is worried about it, but, of course, I told you I burnt Pettis' barn, but I think I can trust you. You say you are an Irish Catholic, and I don't think you will give me away to that A. P. A. Adna Pettis. If you do, I'll shoot you. I carry a loaded gun." Kaveny was at the trial, but was not placed on the witness stand.

The defendant denied that he left his home on the night of the fire, denied the conversation with Swenson, and also the alleged talk with Kaveny, and absolutely denied all connection with the burning of the barn.

Our statute, section 8462, G. S. 1913, provides: "A confession of the defendant shall not be sufficient to warrant his conviction without evidence that the offense charged has been committed." It would seem that outside of the alleged admissions of defendant there was no evidence that the burning of the barn was the result of the criminal intent of anyone. The law is that in arson cases there must not only be shown that the building burned, but that the fire was wilfully set by someone. Nowhere in the charge was the proposition presented to the jury whether the evidence established the *corpus delicti* apart from the defendant's admission or so-called confession. In fact the only reference thereto is found in this sentence which appears to assume that the destruction of the barn was caused by crime: "Now, gentlemen, it is established here upon the trial that the building of Adna Pettis was burned by someone, or burned, at least; and the

question arises as to whether or not the defendant is guilty of setting fire to such barn." As stated above the barn was adjacent to a much traveled road. A tramp or wayfarer may have accidentally started the fire. Cases of spontaneous combustion are not unknown. The record does not disclose any plausible motive on the part of defendant to harm Pettis at the time the barn burned. While animosity then existed towards Mrs. Deubler and daughter, there is nothing to show anything but a friendly feeling toward Mrs. Pettis who was then stopping with defendant. It also appears from Mr. Pettis' testimony that, although he at first opposed defendant's marriage, he congratulated him when it did come off, and there was no enmity between them in July, 1911. The passing remark to Mr. Swenson made prior to the fire does not rise to the dignity of proof that the origin of the fire in the barn was the criminal act of defendant or anyone else. Subsequent statements by defendant are but admissions or confessions, and do not tend to supply the evidence demanded by statute. The following authorities sustain the proposition that, to prove the *corpus delicti* in arson, it is necessary to show not only that the building burned, but that the fire was designedly set by someone. *People v. Wagner*, 71 App. Div. 399, 75 N. Y. Supp. 950; *Williams v. State*, 125 Ga. 741, 54 S. E. 661; *Brown v. Commonwealth*, 87 Va. 215, 12 S. E. 472; *State v. Carroll*, 85 Iowa, 1, 51 N. W. 1159; *State v. Jones*, 106 Mo. 302, 17 S. W. 366; *State v. Parsons*, 39 W. Va. 464, 19 S. E. 876, and other cases cited in note to *Spears v. State* (Miss.) 16 L.R.A.(N.S.) 285. Within this rule we think the evidence, apart from the admission of defendant, too attenuated to prove the *corpus delicti*.

The state invokes the rule of *State v. Nelson*, 91 Minn. 143, 97 N. W. 652; *State v. Crawford*, 96 Minn. 95, 104 N. W. 822, 768, 1 L.R.A.(N.S.) 839; and *State v. Gardner*, 96 Minn. 318, 104 N. W. 971, 2 L.R.A.(N.S.) 49. In the first of those cases the present Chief Justice says: "Our examination of the evidence leaves no doubt in our minds as to their guilt, and we are not in the least hampered by the thought that perhaps they are innocent." The perusal of the record in this case creates a grave doubt of defendant's guilt. It is not necessary to point out the particular evidence and

facts giving rise to this doubt. It may also be said that the failure of the state to place Kaveny on the stand, so that the circumstances of the confession, if such was made, might be fully disclosed, does not in any manner tend to set at rest the doubt referred to.

Order reversed and a new trial granted. The warden of the Minnesota State Prison is directed to deliver the defendant to the sheriff of Le Sueur county to be thence taken for such trial.

HALLAM, J. (dissenting).

I dissent.

Apparently, under the statutes of this state, it is possible for a person charged with crime to serve a substantial term in the penitentiary before the question of his guilt or innocence is finally determined, but it is usually so unnecessary for him to do so that when a defendant has served 15 months in the penitentiary this court should scrutinize very closely the record of his conviction before it holds that the jury that found him guilty and the court that sentenced him proceeded without evidence tending reasonably to prove guilt.

In this case the defendant was convicted February 25, 1913. He was sentenced February 27. Execution of the sentence was stayed. A transcript of the evidence was obtained and a motion for a new trial made. This was denied April 29. An appeal therefrom was perfected April 30, 1913. He might have had his appeal determined at any time, under Rule 1 of this court, which provides that appeals taken during term time "may be placed on the calendar by order of the court when an early decision is necessary to the protection of the rights of either party." The expense of prosecuting this appeal did not stand in his way, for the record had been prepared, and the state guaranteed him "the assistance of counsel in his defense." Const. art. 1, § 6. But he made no move to bring his appeal on for hearing, either during the April term or during the ensuing October term. In October his bondsmen surrendered him to the custody of the sheriff, and on October 13, 1913, the trial court committed him to the penitentiary. He did not move even then. The appeal was not placed on the calendar of this court until April, 1914. Even then it was continued to the October, 1914, term, at the defendant's

own request. Finally after a delay of more than 18 months from the time the appeal was taken, a delay wholly attributable to himself, and after he had in fact served nearly 15 months of his term, he brings this appeal on for argument and asks this court to determine that there was no evidence to sustain his conviction. This voluntary delay should not deny him his liberty if he is indeed being unjustly punished, but the case should be considered in the light of these facts, for such acquiescence in penal servitude is most unusual in the case of an innocent man. The evidence for the state is not strong, but it appears to me sufficient to support a conviction. There is evidence of a confession by defendant which, if true, fastens guilt upon him. It is true that under our statute there must be proof other than defendant's confession to establish beyond a reasonable doubt the *corpus delicti*; that is, to establish that the barn was burned with criminal design by someone. But the conduct of defendant is evidence proper to be considered upon this point. *State v. Laliyer*, 4 Minn. 277 (368). The barn was burned in some manner, and it seems to me that, taking all the evidence other than the confession, it is sufficient to prove that it was burned by criminal design. There are no circumstances pointing affirmatively toward either accident or spontaneous combustion. In other cases, with no stronger evidence, proof of the *corpus delicti* has been held sufficient. *State v. Millmeier*, 102 Iowa, 692, 72 N. W. 275; *Davis v. State*, 141 Ala. 62, 37 South. 676; see *State v. Grear*, 29 Minn. 221, 13 N. W. 140. The case was fairly tried. No exception is taken to the charge of the court. This court could not see the witnesses or hear them testify, as did the jury and the trial court, and it appears to me the evidence is such that after this lapse of time and the voluntary acquiescence of defendant this court should not now disturb the verdict.

**VICTOR TALKING MACHINE COMPANY v. LAURENCE H. LUCKER.<sup>1</sup>**

January 15, 1915.

Nos. 18,833—(96).

**Foreign corporation — sales in Minnesota.**

1. A foreign corporation selling goods to purchasers within the state upon orders received from traveling salesmen or by mail, and which ships goods into the state only to fill such orders, is engaged in interstate commerce, and it is not within the prohibitions of G. S. 1913, §§ 6206-6208 relating to foreign corporations doing business in this state. Its transactions are not rendered local by the fact that it advertises its goods in this state, or by the fact that its traveling salesman turn in orders to local distributors to be filled by them, if the corporation disposes of its goods only by outright sales in the manner above described.

**Same — enforcement of interstate contract.**

2. Such foreign corporation does not lose its right to enforce its interstate contracts in our courts by subsequently engaging in local business without complying with our laws.

**Contract terminable at will.**

3. A contract by one party to sell goods to another as ordered, but for no fixed period, is terminable at will of either party, and no right to damage can be predicated on its termination.

**Lawful competition.**

4. Competition in trade is lawful. One man may seek the business of

<sup>1</sup> Reported in 150 N. W. 790.

---

Note.—On the question whether soliciting trade is doing business within the state, see notes 9 L.R.A.(N.S.) 1214 and 23 L.R.A.(N.S.) 834. And as to whether sale by foreign corporation of goods stored in state is intrastate business, see note in 18 L.R.A.(N.S.) 134.

For the validity of contracts made by foreign corporations which have not complied with statutory conditions of the right to do business in a state, see note in 24 L.R.A. 315. And upon the enforceability in Federal court, or court of another state, of a contract made by a foreign corporation which has not complied with the conditions of doing business within the state, see note in 26 L.R.A. (N.S.) 999.

competitor and may tell the trade not to buy of his competitor, so long as he indulges in no threat, coercion, misrepresentation, fraud or other harassing means.

Action in the district court for Hennepin county to recover \$6,-582.88 for goods sold and delivered. The case was tried before Steele, J., who granted plaintiff's motion for judgment on the pleadings as to the counterclaim set up in defendant's answer, and a jury which returned a verdict in favor of defendant. Plaintiff's motion for judgment in its favor for the amount demanded, notwithstanding the verdict, was granted. From the judgment in favor of plaintiff for \$7,441.96 and from the judgment on the pleadings so far as the counterclaim of defendant was concerned, defendant appealed. Affirmed.

*Henry Deutsch and Charles G. Laybourn, for appellant.*

*William W. Bartlett and Brooks & Jamison, for respondent.*

HALLAM, J.

Plaintiff sued for goods sold and delivered. The goods were sold and delivered and the price has not been paid. The defense is that plaintiff is a foreign corporation and that it was doing business in this state without having complied with its laws. A counterclaim is also pleaded alleging wrongful interference with defendant's business. The court gave judgment for plaintiff on the pleadings as to the counterclaim. The case was tried upon the complaint of plaintiff and the defense of defendant, and the court gave judgment for plaintiff notwithstanding the verdict of the jury for defendant.

Sections 6206, 6207, G. S. 1913, provide that every foreign corporation doing business in this state shall appoint an agent and maintain an office or place of business in the state, file with the secretary of state a copy of its charter and a statement of its business, and pay a fee into the state treasury. Section 6208 provides that "no corporation which shall fail to comply with the foregoing provisions shall maintain any suit or action \* \* \* in any of the courts of this state." This plaintiff is a New Jersey corporation,

and it did not comply with the provisions of this statute. The question arises, is it thereby precluded from maintaining this action?

It may be conceded that defendant was doing business in this state. But not all business in the state is within the prohibitions of the statute. It is beyond the power of the legislature to enact laws prohibiting or restricting the transactions of interstate commerce, and it has been definitely held that this statute was not intended to apply to corporations engaged in such business, but only to foreign corporations doing local business within the borders of this state. *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N. W. 616. See *International Textbook Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 18 Ann. Cas. 1103.

Plaintiff's method of doing business at the time this cause of action arose was as follows: It disposed of its goods through the medium of distributors or jobbers, and retail dealers. Plaintiff selected its distributors and made contracts with them, limiting the territory in which and the persons to whom they could sell, and the prices they should charge. Retail dealers were likewise obliged to enter into a contract with plaintiff containing somewhat similar limitations. Plaintiff publicly advertised its wares for the purpose of attracting consumers to buy of its dealers. It also employed traveling salesmen, who took orders for goods which were filled from New Jersey or were turned over to distributors in Minnesota and were filled by them. It had no store or warehouse or place of business in Minnesota, and shipped goods only to fill orders received by its New Jersey office by mail or through traveling salesmen. Its benefit from sales turned over to Minnesota distributors arose from the fact that the distributors or dealers who made or filled such sales or orders must in turn buy from it. The transactions between plaintiff and its distributors were out and out sales without condition.

This court has held in substance that where a foreign corporation, engaged in the manufacture of goods in another state, sells and delivers its goods on orders taken by traveling salesmen in this state, its business is interstate commerce. *Rock Island Plow Co. v. Peterson*, 93 Minn. 356, 101 N. W. 616; *J. B. Inderrieden Co. v. J. C. Johnson Co.* 112 Minn. 469, 128 N. W. 570; see also *Caldwell v. North*

Carolina, 187 U. S. 622, 23 Sup. Ct. 229, 47 L. ed. 336; Swift & Co. v. United States, 196 U. S. 375, 398, 25 Sup. Ct. 276, 49 L. ed. 518; Rearick v. Pennsylvania, 203 U. S. 507, 512, 27 Sup. Ct. 159, 51 L. ed. 295; Dozier v. Alabama, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. ed. 965, 28 L.R.A.(N.S.) 264. The evidence in this case brings the business done by plaintiff, at the time this cause of action arose, within the interstate commerce rule. Some of the restrictions imposed upon its distributors and dealers, particularly those by which it limited the price at which they might sell, may have been void. Bauer & Cie v. O'Donnell, 229 U. S. 1, 16, 33 Sup. Ct. 616, 57 L. ed. 1041, 50 L.R.A.(N.S.) 1185. But this did not change the relation of the parties. Some of the provisions of its contracts may have been consistent with a contract of agency. (D. M. Osborne & Co. v. Josselyn, 92 Minn. 266, 99 N. W. 890) but, taking all of the transactions together, we think the relation of the parties was clearly that of vendor and vendee, and not of principal and agent. The fact that orders taken were turned in to a local dealer to be filled by him as a sale of his own goods, does not change the character of the commerce so long as all sales and deliveries made or contemplated by plaintiff were interstate transactions. Neither did the fact of advertising by plaintiff in this state for the purpose of creating a public demand for its products to be sold as aforesaid, in any sense render the transactions local. "Importation into one state from another is the indispensable element, the test, of interstate commerce; and every negotiation, contract, trade, and dealing between citizens of different states, which contemplates and causes such importation \* \* \* is a transaction of interstate commerce." International Textbook Co. v. Pigg, 217 U. S. 91, 107, 30 Sup. Ct. 481, 485 (27 L.R.A.[N.S.] 493, 18 Ann. Cas. 1103) quoting Butler Bros. Shoe Co. v. U. S. Rubber Co. 156 Fed. 1, 17, 84 C. C. A. 167. The transactions in question were interstate commerce within this rule.

Defendant relies on Thomas Mnfg. Co. v. Knapp, 101 Minn. 432, 112 N. W. 989. But there the evidence showed that the corporation had large quantities of goods stored in the state from which sales and deliveries were made by its agents, and the proceeds of the sales

when made belonged to the corporation. These facts distinguish that case.

2. Defendant offered to prove that after the transactions between plaintiff and defendant, and after this action was brought, plaintiff adopted another form of contract, by the terms of which no machines or records were to be sold, either to distributors or dealers or to the public, but only licensed for a royalty. It is not so clear that this method of putting out goods constitutes an interstate commerce transaction. But this question we do not deem it necessary to decide. Even if plaintiff did subsequently engage in local business, its omission to comply with the law as to such local business does not render its previous interstate transactions either void or unenforceable in our courts. It has been strongly intimated, and apparently taken for granted, that our statute prohibits resort to our courts only in case of demands growing out of its illegal business. *G. Heileman Brewing Co. v. Peimeisl*, 85 Minn. 121, 88 N. W. 441. But whether or not the statute requires this construction, we are clear that it must not be construed as forbidding resort to our courts for the enforcement of any obligation arising out of interstate commerce, even though the corporation is transacting local business without compliance with our laws. Such a statute would be beyond the power of the state, for "any legislation of the state which seeks to prevent the enforcement of the contract is \* \* \* an invasion of the exclusive right of congress" to regulate interstate commerce. "If the state cannot declare the contract void, it cannot prevent the enforcement of the contract." *McNaughton v. McGirl*, 20 Mont. 124, 135, 136, 49 Pac. 651, 655, 38 L.R.A. 367, 63 Am. St. 610. It was not necessary for the legislature to expressly except the enforcement of such contracts from the prohibition of the statute. The legislative intention will not be presumed to prohibit their enforcement. *5 Thompson, Corporations*, § 6641. See also *Attorney General v. Electric Storage Battery Co.* 188 Mass. 239, 74 N. E. 467, 3 Ann. Cas. 631; *State v. Creamery Package Mfg. Co.* 115 Minn. 207, 132 N. W. 268, Ann. Cas. 1912D, 820.

3. The counterclaim contains many allegations of alleged wrongs. We have carefully examined them all. Some of them do not require

special mention. We shall refer to two alleged grounds of recovery on which we understand defendant to mainly rely.

It alleges that the plaintiff terminated the contract between plaintiff and defendant, arbitrarily and without cause while defendant had a large stock of machines and records on hand, then refused to sell defendant any further machines or records, and that defendant as a result suffered damage. The contract is not set out in full. There is no allegation that it was for any particular time. It was accordingly terminable at will of either party and no right to damages can be predicated on its termination. 35 Cyc. 118; *Irish v. Dean*, 39 Wis. 562; *Stonega Coal Co. v. L. & N. R. Co.* 106 Va. 223, 55 S. E. 551, 9 L.R.A.(N.S.) 1184; *Willcox & Gibbs Sewing Mach. Co. v. Ewing*, 12 Sup. Ct. 94, 35 L. ed. 882, 141 U. S. 627; *Newhall v. Journal Printing Co.* 105 Minn. 44, 117 N. W. 228, 20 L.R.A.(N.S.) 899. The case is quite different from *St. Barnabas Hospital v. Minneapolis Int. Ele. Co.* 68 Minn. 254, 70 N. W. 1126, 40 L.R.A. 388, where the contract was to care for a sick person at a hospital, and it was held that such a contract could not be terminated while the person so cared for could not be removed. The facts of that case are exceptional and its rule cannot be generally applied.

4. The only other allegation of the counterclaim requiring special mention is the following:

That plaintiff at the time of the termination of its contract "had in its possession a full and complete list of the retailers or dealers to whom defendant had been selling plaintiff's talking machines and records, and that \* \* \* plaintiff for the purpose of \* \* \* destroying and ruining defendant's business, notified each of said retailers and dealers with whom defendant had been doing business that defendant was no longer a jobber or distributor of its goods and that they must thereafter purchase Victor talking machines and records from jobbers or distributors other than defendant;" that defendant had on hand a large stock of machines and records of plaintiff's manufacture; that but for plaintiff's acts he could have disposed of them at a profit, but that by reason of plaintiff's acts he will be obliged to dispose of them at a loss.

This claim is founded, not on the contract, but in tort. The liability of a party for interference with the contracts or the business of another, is a subject upon which courts have manifested some diversity of opinion. This is not a case of interference with an existing contract, as in *Faunce v. Searles*, 122 Minn. 343, 142 N. W. 816. It is a case of interference with defendant's business which prevented his making sales he otherwise would have made. "To justify an act of interference of this sort, it must be founded upon some lawful object." *Joyce v. Great Northern Ry. Co.* 100 Minn. 225, 233, 110 N. W. 975, 979, 8 L.R.A.(N.S.) 756. One man having no legitimate interest to subserve, may not lawfully ruin the business of another by maliciously or wantonly inducing his patrons and third persons not to deal with him. *Ertz v. Produce Exchange of Minneapolis*, 79 Minn. 140, 145, 81 N. W. 737. But a man has a legitimate interest in the advancement of his own business interests. Competition in trade is lawful. It is well settled that "everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition. \* \* \* If disturbance or loss come as a result of competition" he has no right to complain "unless some superior right by contract or otherwise is interfered with." *Walker v. Cronin*, 107 Mass. 555, 564. These rules are substantially approved in *Joyce v. Great Northern Ry. Co.* 100 Minn. 225, 110 N. W. 975, 8 L.R.A.(N.S.) 756; *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L.R.A.(N.S.) 599, 131 Am. St. 446, 16 Ann. Cas. 807; *Scott-Stafford Opera House Co. v. Minneapolis Musicians Assn.* 118 Minn. 410, 136 N. W. 1092; see also 1 Cyc. 650; 38 Id. 503. In this case defendant had for sale goods of plaintiff's manufacture. Plaintiff had the same class of goods for sale. In this sense they were competitors. Defendant had the right to sell to anyone he chose, among others, to the licensed dealers of plaintiff. No contract or other obligation prevented his selling to them or prevented their buying from him. In this situation, plaintiff notified these dealers that defendant was no longer a jobber or distributor of its goods. This was true, and no action can be predicated on such a statement. It also told them that they must thereafter buy Victor

machines and records from jobbers or distributors other than defendant. This was a direction which the dealers had the right to follow or not, as they pleased. There is no allegation that plaintiff used or attempted any sort of coercion. There is no charge of misrepresentation, as in *Virtue v. Creamery Package Mfg. Co.* 123 Minn. 17, 142 N. W. 930, 1136. This was a notice by one competitor telling buyers not to do business with another. Such conduct, without more, is not actionable. One man may lawfully seek the business of a competitor and may tell the "trade" not to buy of his competitor, so long as he indulges in no threat, coercion, misrepresentation, fraud or other harrassing methods. The court properly held that the allegations of the answer were not sufficient to constitute a counterclaim.

Judgments affirmed.

---

GEORGE ARVESON v. BOSTON COAL DOCK & WHARF  
COMPANY and Others.<sup>1</sup>

January 15, 1915.

Nos. 18,844—(103).

**Facts — injury to servant.**

1. Defendant company operated an unloading rig to unload coal from vessels to its dock. The two other defendants were hoisters and operated the machinery. Plaintiff was an oiler. It was extremely dangerous to oil the machinery when it was in motion. When plaintiff went upon the rig to oil, it was his custom to notify the hoisters, and it then became part of their business to keep the rig safe by keeping all machinery inoperative as

<sup>1</sup> Reported in 150 N. W. 810.

---

Note.—For the master's duty as to rules and regulations for conduct of business, see note in 43 L.R.A. 306. And as to the nondelegability of the master's duty to frame rules and regulations for the conduct of business, see note in 54 L.R.A. 86.

The question of the master's liability for negligence of a co-servant in respect to the details of the work is discussed in a note in 54 L.R.A. 106.

long as plaintiff was on the rig and until he gave them a signal that he was through. On the occasion in question plaintiff went on the rig to oil when the machinery was not in motion. There is evidence that he notified the hoisters. Nevertheless one of the hoisters started the machinery while plaintiff was upon the rig, without receiving his signal, and plaintiff was injured.

**Master's duty to provide safe place to work — enforcement of rules.**

2. One of the absolute duties of the master is to use reasonable care to provide a safe place to work. This duty is not violated where the unsafety is caused by acts of co-servants in carrying out the details of the work. The master may adopt rules to facilitate the carrying on of his business, and these rules may operate for the protection of servants exposed to dangers. The question then arises whether the enforcement of such rules is an absolute duty of the master.

**Master's duty to enforce certain rules.**

3. It is not the absolute duty of the master to see that every rule of his business is observed. His obligation in respect to mere details of the work is not rendered more extensive by the mere fact that he has systematized those details by adopting rules. If, however, the office of the rule is to provide a method for the discharge of some nondelegable duty of the master, then his duty to see that the rule is observed is absolute and nondelegable.

**Same — enforcement of rule to control independent work.**

4. Where the servant is required to work in a place which is necessarily rendered dangerous by the doing of some independent work of the master, then the master is required to control such independent work while the servant is so engaged. If he adopt rules or sanction customs designed to effect this end, it is his duty to see that such rules or customs are observed, and he is liable for the negligent failure of those charged with that duty. It is *held* that the hoisters were vice principals, and defendant company is liable for their negligence.

**Damages not excessive.**

5. The damages are not excessive.

Action in the district court for St. Louis county to recover \$21,000 for personal injuries received while in the employ of defendant company. The case was tried before Cant, J., and a jury which returned a verdict for \$11,000. From an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial, they appealed. Affirmed.

*Abbott, MacPherran, Lewis & Gilbert and Washburn, Bailey & Mitchell, for appellants.*

*John Jenswold and C. R. Magney, for respondent.*

HALLAM, J.

1. Defendant coal company operates a coal dock at Duluth. Coal is unloaded from vessels to the dock by means of hoisting rigs. The one of these with which we are concerned is a movable steel structure about 40 feet high and 350 feet long. The essential features of this rig are as follows: A carriage 8 feet long runs on a track the whole length of the rig at a level of 30 feet or more above the floor of the dock. From this carriage is suspended the receptacle by means of which coal is unloaded. A walk runs alongside this carriage track for the full length of the rig. At a little lower level is a hoist house, 10 feet square, with a tin roof and walls of a single thickness of boards. The roof of the hoist house is on a level with the walk that runs alongside the carriage track. A ladder extends up the side of the hoist house; by this the employees ascend to the tin roof and thence proceed to the walk alongside the carriage track.

In the hoist house were located defendants Olson and Peterson, the hoisters, who operated from there the machinery that moves the rig and the carriage. Plaintiff was an oiler. It was his duty to oil the carriages and other mechanism of six rigs. The oiler determines when oiling is to be done. The work is not particularly dangerous as long as the machinery is not in motion, but a movement of the carriage while the oiler is upon it means almost certain death or serious injury. For this reason the regulations governing the hoisters are very explicit. After the oiler gives notice to the hoisters that he is going to oil, and goes out on the rig for that purpose, it is an invariable custom that the carriage must not be moved until the oiler gives a signal that he is through. It is the business of the hoisters to see to that. It is part of the duty for which they are hired, to keep the rig safe by keeping all machinery inoperative while the oiler is out upon the rig. Three sides of the hoist house are of glass, so that the hoisters may look out upon the rig for that purpose.

On the occasion in question and while the rig was not in operation, plaintiff came upon it to oil. As he did so he passed Olson who was standing just outside the hoist-house door. Plaintiff testified he told Olson as he passed that he was going to oil the carriage. Peterson was just inside the door, and within hearing. Plaintiff then went up the ladder on the side of the thin wall of the hoist house and walked along the tin roof over Peterson's head to the work of oiling the rig. While he was oiling the carriage, Peterson started it up, and caused the injury to plaintiff of which he complains.

The court instructed the jury that the negligence of Olson or of Peterson would be considered the negligence of the company; that, if Olson alone was negligent, plaintiff could recover against Olson and the company, and if Peterson was also negligent, recovery might be had against him. The jury found against all defendants.

There is little difficulty in sustaining the finding that Olson was negligent in not seeing to it that the carriage was not moved. We think there is also evidence to sustain a finding that Peterson knew plaintiff was going up to oil the carriage and that Peterson also was negligent. Peterson admitted that he was near enough to hear, at the time of the conversation between plaintiff and Olson, and on cross-examination admitted "It might be I heard something, but I can't remember." The jury might find that he did hear what was said and also that he must have heard plaintiff walk up the ladder outside this thin wall of the shanty and across the tin roof above his head. He may have forgotten, but this in no measure lessened his duty.

While the evidence seems sufficient to establish this fact of knowledge on the part of Peterson, we do not deem this vital to the case. We think the evidence is substantially undisputed that, under such conditions as existed here, it was not customary or necessary for the oiler to notify more than one of the hoisters, and that the duty to protect him then devolved on the one so notified. Plaintiff, Olson and Peterson all testified unequivocally to this fact. Only one other witness testified on the subject, the company's superintendent, Mr. Carr, who was called as an adverse witness by plaintiff.

He repeatedly testified as did the other witnesses. Upon being pressed on cross-examination, however, he said that if the hoisters are not together it is the duty of the oiler to notify both of them. But he made it clear that this applies to the cases that sometimes arise where there is "one man on one end of the bridge and one man on the other; then both of them got to be notified," or where one hoister "throws in the clutches" while the other is turning on steam, and the two are some distance apart; but referring to this case he said: "Both men are in the same place there," and they were but a few feet apart. Under such circumstances as existed here, the obligation of either one who was notified was as imperative as that of both could be, and, if the defendant was bound by the default of both, it was likewise bound by the default of either one.

2. This brings us to the more difficult question, whether the company was answerable for the neglect of these men. As a rule a master is not bound to indemnify his servant for injuries caused by the negligence of a fellow servant in the same common employment. This familiar doctrine was first introduced in England in 1837, in *Priestley v. Fowler*, 3 M. & W. 1, where a butcher's servant was held to have no cause of action against the master for the breaking down of a van, due to overloading by another servant with whom he was riding. The doctrine was first introduced in the United States in 1841, in *Murray v. S. C. Railroad Co.* 1 McMullan (S. C.) 385 (49), where plaintiff, a fireman, was injured by the derailment of an engine due to the negligence of the engineer whom plaintiff had selected as his associate, and whom plaintiff had warned of the danger. The cause is one of the first arising out of the conveyance of human beings by locomotives on railroads. In these cases some emphasis is laid upon the fact that the association of the employees afforded both opportunity and duty to protect themselves from the negligence of one another. In the next reported case, however, *Farwell v. Boston & W. R. R. Co.* 4 Metc. (Mass.) 49, 60, 38 Am. Dec. 339, Shaw, C. J., makes it clear that "the master \* \* \* is not exempt from liability, because the servant has better means of providing for his safety, \* \* \* but because the im-

plied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself," and "hence the separation of the employment into different departments cannot create that liability."

In the tremendous number of fellow-servant cases that have followed there is conflict between two tendencies, the one a tendency to extend the general rule of nonliability applied, in these early cases, to the complex and dangerous conditions incident to the machinery and appliances of later times, and the other a tendency to increasingly make exceptions and place limitations upon the general doctrine, in order to conform the law to new and changed conditions. The result is the recognition of an increasing number of absolute duties of the master.

One of these absolute duties of the master is the duty to use reasonable care to provide a safe place to work. This duty is not violated where unsafety is caused solely by the acts of coservants in carrying out mere details of the work. 4 Labatt, Master & Servant, § 1531.

The master may adopt rules to facilitate the carrying on of his business, and these rules may operate for the protection of the servants exposed to danger. The question then arises whether the enforcement of such rules is an absolute duty of the master.

3. It cannot be said that an employer owes to his employee an absolute duty to see that every rule of his business is observed. The obligation of the employer in respect to the supervision of mere details, is not rendered more extensive by the fact that he has systematized the execution of those details by adopting suitable rules. Such rules do not alter the character of the acts to which they relate. 4 Labatt, Master & Servant, § 1506. If, however, the office of the rule is to provide a method for the discharge of some nondelegable obligation, the duty of the employer to see that the rule is observed is absolute and nondelegable, for "the liability resting upon him for the proper performance of the \* \* \* duty is not shifted by the adoption of rules or regulations providing for the performance of the act or duty by the agent of the master." *Hankins v. New York L. & E. R. Co.* 142 N. Y. 416, 37 N. E. 466, 26 L.R.A. 396, 40 Am. St. 616.

4. In this case there existed a custom so well established that it had all the force of a rule, the observance of which would have fully protected plaintiff. Was it a custom providing a method for the discharge of some absolute duty of the defendant company? We think it was. It was the clear duty of the defendant company to keep this place of work free from the exceedingly great danger incident to the operation of the carriage, and to make and enforce proper regulations to that end. If these hoisters had been charged with the duty of giving plaintiff a customary warning before starting the machinery, the duty so imposed would, under repeated decisions of this court, have been an absolute duty of the company, and their negligence its negligence, for the rule in this state is that, "where the place of work is inherently dangerous, and signals are required by order of the master or, by common custom, for the protection of the employees and to provide and to maintain for them the safety of their place of work, and are relied upon by the employees as a means of saving themselves from harm, it becomes the absolute duty of the master to give them, and a failure to do so, though the failure be the neglect of a servant engaged in the common employment, renders the master liable to a servant who is injured in consequence of the neglect." *Elenduck v. Crookston Lumber Co.* 121 Minn. 53, 55, 140 N. W. 125; *Anderson v. Pittsburgh Coal Co.* 108 Minn. 455, 466, 122 N. W. 794, 26 L.R.A.(N.S.) 624. And this is in accord with recent decisions in other jurisdictions. *Western Electric Co. v. Hanselmann*, 136 Fed. 564, 69 C. C. A. 346, 70 L.R.A. 765; *Potlatch Lumber Co. v. Anderson*, 199 Fed. 742, 118 C. C. A. 180; *Lucey v. Stack-Gibbs Lumber Co.* 23 Idaho, 628, 131 Pac. 897, 46 L.R.A.(N.S.) 86; *Belleville Stone Co. v. Mooney*, 61 N. J. Law, 253, 39 Atl. 764, 39 L.R.A. 834; *Ondis Admx. v. Great A. & P. Tea Co.* 82 N. J. Law, 511, 81 Atl. 856, 46 L.R.A.(N.S.) 777; *Comrade v. Atlas Lumber Co.* 44 Wash. 470, 87 Pac. 517.

These hoisters were not charged with the duty of giving plaintiff a warning before moving the machinery. Warning would have been of no avail. The machinery must not move at all. They were charged with the duty of doing the one thing that would keep this

place safe during the time plaintiff was there engaged; that is, to see to it that the machinery was not moved until plaintiff said the word. It seems almost captious to say that a duty to give an employee a customary signal before starting dangerous machinery is a personal duty of the master, and yet a duty to keep the machinery inoperative until a customary signal is received from the employee subject to the danger, is a mere detail of the work, where both the purpose of the custom and the consequence of its disobedience are in each case absolutely the same. It seems to us a sound and humane principle that, where an employee is required to work in a place which is necessarily rendered dangerous to life and limb by the doing of some independent work of the employer, the employer should be required to stop such independent work and keep it inoperative while the employee is so engaged. The employer cannot rid himself of this duty by delegating it to others, and, if he adopt rules and sanction customs designed to accomplish this end, it is his duty to see that such rules or customs are observed, and an employee charged with the duty of securing their observance is a vice principal.

This holding is in line with many recent cases.

In *Paauhau Sugar Plantation Co. v. Palapala*, 127 Fed. 920, 62 C. C. A. 552, injury resulted from negligence of a winchman operating a crane in prematurely lowering a load of sugar. It was the winchman's duty to lower it part way and then wait until the boatman signaled him to lower the sugar into the boat. The master was held liable for injury to the boatman due to lowering the load into the boat without signal. Hawley, J., said: "The responsibility of appellant for the negligence of the winchman is well settled."

In *Massy v. Milwaukee Ele. R. & L. Co.* 143 Wis. 220, 126 N. W. 544, 40 L.R.A.(N.S.) 814, 139 Am. St. 1096, it was held that an employee charged with the duty of connecting and disconnecting an electrical current from wires is not a fellow servant of a lineman whose duty is to work on the wires, so as to relieve the master from liability for injury to the lineman by the negligence of the operator in turning current, contrary to instructions, onto a wire upon which the lineman was at work.

In *Gerrish v. New Haven Ice Co.* 63 Conn. 9, 27 Atl. 235, plaintiff was engaged with other employees in conveying ice through a run into an ice-house. Plaintiff was, in the course of this work, ordered to go into the run to remove a broken float. Defendant had a rule that the superintendent or person in charge of the run should at such time cause the engine to be stopped and the engineer to be personally notified, and that after such notice the engineer should not start the engine upon the ordinary signal, but only upon a special direction to do so. The engineer was not so notified, and had no knowledge that plaintiff was in the run, and started the engine upon hearing the ordinary signal given in some manner unknown. It was held that the disobedience of the rule was the neglect of the defendant. See also *Hunter v. Alderman & Sons Co.* 89 S. C. 502, 71 S. E. 1082; *Koerner v. St. Louis Car Co.* 209 Mo. 141, 107 S. W. 481, 47 L.R.A.(N.S.) 292; *Murphy v. N. Y. C. & H. R. R. Co.* 118 N. Y. 527, 23 N. E. 812; *Salmons v. Norfolk & W. Ry. Co.* (C. C.) 162 Fed. 722.

We hold that the hoisters were vice principals, and defendant company is liable for their negligence.

The jury assessed plaintiff's damages at \$11,000. The damages were not excessive. Plaintiff sustained a compound fracture of the upper part of the right thigh; the bones protruded and the muscles separated; there was also a comminuted fracture of the leg below the knee. There was much hemorrhage and a large amount of sloughing of the muscles. Infection set in, large pieces of muscle came out. The leg shortened two and one-half inches. Plaintiff's suffering was intense, and for some time he was in a very critical condition. He will never be able to resume his former occupation or to do any heavy work. The leg has practically lost its usefulness. His earnings were from \$60 to \$90 a month, varying with the seasons of the year. The damages, though large, are not clearly excessive.

Order affirmed.

STATE v. HARRY ROBY.<sup>1</sup>

January 15, 1915.

Nos. 18,900—(6).

**Criminal law — evidence of second offense.**

1. In a prosecution for the crime of carnal knowledge of a female child under 14, alleged to have been committed May 20, evidence of a second offense committed upon the person of the same child on June 2 is admissible. Where the county attorney at the close of the state's case expressly elected to proceed to judgment upon the first charge, it is unimportant whether or not the method of proof followed by the state constituted an implied election to so proceed.

**Refusal to compel state to elect.**

2. Where two offenses of this character are proven, it is not error for the court to refuse to require the state to elect upon which charge it will proceed until the close of the state's case.

**Witness — exclusion of wife's testimony against husband.**

3. The county attorney called the wife of defendant as a witness for the state. Defendant claimed his statutory privilege and excluded her testimony. *Held*, the action of the county attorney in calling the wife was not misconduct, though defendant, before he was indicted, had notified the county attorney that he would object to the evidence of his wife either before the grand jury or elsewhere or otherwise.

**Conduct of court and county attorney.**

4. Certain conduct of the court and of the county attorney reviewed and *held* to be not improper.

Defendant was indicted, tried in the district court for Nicollet county before Olsen, J., and a jury and convicted of the crime men-

<sup>1</sup> Reported in 150 N. W. 793.

---

Note.—As to evidence of other crimes in prosecution for rape or assault to rape, see notes in 62 L.R.A. 314, 322, 329 and 48 L.R.A.(N.S.) 236.

For husband or wife as witness against the other in criminal prosecutions, see notes in 2 L.R.A.(N.S.) 862; 22 L.R.A.(N.S.) 240, and 41 L.R.A.(N.S.) 1213. And upon the question of wife as witness before grand jury, see note in 28 L.R.A. 322.

tioned in the opinion. From an order denying his motion for a new trial, defendant appealed. Affirmed.

*R. G. Anderson, M. E. Stone and Thomas Hessian, for appellant. Lyndon A. Smith, Attorney General, John C. Nethaway, Assistant Attorney General, and George T. Olsen, County Attorney, for respondent.*

HALLAM, J.

Defendant was convicted of the crime of carnal knowledge and abuse of a female child between the age of 10 and 14 years. There is evidence sufficient to sustain the verdict. This is conceded, but defendant assigns several errors which he urges as ground for a new trial.

The complaining witness, when called by the state, testified to the commission of an offense, such as charged in the indictment, about May 20, and to a second offense of the same kind about June 2. Defendant at once asked the court to rule that the state by first introducing evidence of an act committed May 20 elected by implication to rely on that date as the true date. The court refused to so rule. It could make no difference whether there was an implied election or not. May 20 was the date upon which the prosecution finally proceeded and upon which the conviction was based. It is accordingly unimportant whether the state could have proceeded to judgment on a charge based upon any other date. It did not undertake to do so.

It is urged that, on a prosecution for an offense committed on May 20, evidence of a second offense committed June 2 was not properly in the case. The court was asked to strike out this evidence, and its refusal to do so is assigned as error. It is quite well settled that, in this class of carnal crimes, evidence of similar offenses committed prior to the date charged may properly be received. It is contended, however, that evidence of offenses subsequently committed is not admissible. This subject was considered in *State v. Schueller*, 120 Minn. 26, 138 N. W. 937. In view of the line of argument followed by the attorneys for the state, it is proper here to say that no significance is attached to the fact that the acts to

which the evidence related all occurred prior to June 25, the date charged in the indictment. The significant date is the date upon which the state relies for conviction, and the question is whether it is proper to receive proof of acts subsequent to this date. In the Schueller case the subject is discussed with reference to the date charged "in the indictment," but in that case the date charged in the indictment and in the proof was the same. It was made clear in the Schueller case that the courts are divided on the question of the propriety of receiving proof of later offenses. It is there said, however, that "it may well be doubted whether there is any real or substantial basis for the distinction" between evidence of earlier and later offenses. Evidence of other offenses, when admissible at all, is received by way of corroboration of the main charge, and on the theory that the commission of other similar acts tends to show opportunity and inclination to commit the crime with which the defendant is charged. Presumption of continuance of a condition once shown to exist may enter into consideration, but it is not the controlling factor, and we think that evidence of subsequent acts within the limit of reasonable time may be received. We have no doubt that in a case of this sort, evidence of commission of an act of the same character within less than two weeks after the date of the act charged, would almost universally be given some corroborative effect in the minds of men unaccustomed to legal technicalities. Evidence of prior acts may have greater probative effect, but the difference is mainly a difference of degree.

2. Early in the trial defendant asked the court to require the county attorney to elect upon which date he would rely for conviction. The court refused to require an election until the close of the state's case. This is assigned as error. This question is disposed of in *State v. Schueller*, supra. The charge there was the same as here. There, as here, the trial court refused to require an election until the close of the state's case. It was held that a motion to require an earlier election was addressed to the sound discretion of the trial court and that its denial was not error. We adhere to the rule there adopted. A different rule may obtain in case of crimes so wholly unrelated that proof of other offenses is not properly in the case at

all. We are not concerned with such cases here, and we make no decision in regard thereto.

3. The day before defendant was indicted, having employed counsel, he served upon the county attorney a notice in writing, in which he objected to the taking of any evidence of his wife "either before the grand jury or elsewhere or otherwise." After the state had closed its case, the county attorney asked permission to reopen it, and said: "I would like to call Mrs. Roby." Objection was made that she was incompetent. The court said: "She is competent, but she is excluded from testifying without his consent; if you do not consent to it, she cannot testify." Defendant's counsel again objected. The county attorney then said: "I guess that is true \* \* \* as long as there is objection to it, she cannot testify because she is his wife." Thereupon defendant's counsel excepted to the offer as improper and prejudicial, and asked "that the jury be instructed as to that." It is contended the offer to call Mrs. Roby was such misconduct as to warrant setting aside the verdict of the jury. The statute provides that:

"A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent." G. S. 1913, § 8375, subd. 1.

We find great diversity of opinion as to the proper procedure where one party may desire testimony as to which the other party is entitled to claim privilege, and as to the right of comment by one party in case the privilege is asserted. Some courts permit comment in argument of counsel on the fact that the privilege has been exercised. *Mercer v. State*, 17 Tex. App. 452; *State v. Brown*, 118 La. 373, 42 South. 969; *Hampton v. State*, 7 Okla. Crim. Rep. 291, 123 Pac. 571, 40 L.R.A.(N.S.) 43. Other courts do not. *Brackney v. Fogle*, 156 Ind. 535, 60 N. E. 303; *Arnold v. Maryville*, 110 Mo. App. 254, 85 S. W. 107; *Knowles v. People*, 15 Mich. 408; *Johnson v. State*, 63 Miss. 313; *State v. Shouse*, 188 Mo. 473, 87 S. W. 480; *State v. Moody*, 150 N. C. 847, 64 S. E. 431; see also *Penn. R. Co. v. Durkee*, 147 Fed. 99, 78 C. C. A. 107, 8 Ann. Cas. 790. In a personal injury case in Iowa it was held reversible error to require a witness to answer a question as to whether she was willing

that physicians who had treated her in the past might disclose any communication made to them. *McConnell v. City of Osage*, 80 Iowa, 293, 45 N. W. 550, 8 L.R.A. 778. On the other hand, in New York in a criminal case, after defendant's wife was offered as a witness by the prosecution and was excluded on objections of prisoner's counsel, it was held proper for the court to remind the jury that the wife was an eye witness, and that defendant's neglect in calling her as a witness was a circumstance which the jury had a right to consider, and that there was a fair presumption that her evidence would not be favorable. *People v. Hovey*, 92 N. Y. 554. In another Iowa case, a criminal case, similar statements in the argument of the state's attorney to the jury were held not prejudicial misconduct. *State v. Toombs*, 79 Iowa, 741, 45 N. W. 300.

We are not disposed to go to either of these extremes. In *National German-American Bank v. Lawrence*, 77 Minn. 282, 79 N. W. 1016, 80 N. W. 363, it was said, the failure to call a spouse is not a case of suppression of evidence which warrants the court in instructing the jury that they might infer that the testimony would be unfavorable. On the other hand, it is quite clearly established that the wife is a competent witness, and that her testimony may properly be received and considered, unless objected to on the ground of privilege. In *re Holt's Will*, 56 Minn. 33, 57 N. W. 219, 22 L.R.A. 481, 45 Am. St. 434; *Coles v. Shepard*, 30 Minn. 446, 16 N. W. 153; *Maa-taja v. Saarenpaa*, 118 Minn. 255, 260, 136 N. W. 871. As applied to the facts of this case, we think the proper rule is stated by Wigmore as follows: That "the party desiring to compel the spouse to testify may at least call for the testimony, and is not to be deprived of it until the party-spouse formally objects and claims the privilege" (3 Wigmore, Evidence, § 2244), and we believe this procedure has been usually followed in this state.

It is claimed the previous notice of defendant advised the county attorney that consent was withheld, and rendered his conduct wrongful. Precedent will not aid us much in determining the effect of this notice, for it is quite unusual for a person to make objection to testimony which may be offered to prove a crime against him, on the ground of privilege or otherwise, before he has been indicted of any

offense. But we think the effect of the notice should not be held such as to make it misconduct for the state to proceed in the usual way. The court might properly enough have instructed the jury that the objection of the defendant to the testimony of his wife should not weigh against him, but we cannot hold that the failure to do so was error.

4. After the state had closed its case and the county attorney had elected the offense upon which he would rely, defendant's counsel asked for a recess so that they might find out what defendant knew about the alleged offenses, and have "an opportunity to find out about the matter they are relying on, so we may meet it." The court remarked: "I do not think there has been any lack of opportunity in this case to find out," but finally took a recess. Defendant contends that this remark conveyed an insinuation that the defendant was guilty. We cannot so construe the language of the court. It was merely an intimation that there had been no lack of opportunity for conference between the attorney and client.

The county attorney, on cross-examination of defendant, made inquiries as to who was with defendant at various places he visited during the fall of 1913. He refused to answer, on the ground that the answer might tend to incriminate him in a matter foreign to the offense with which he is charged. It is urged that persistence in these questions was misconduct. Each question related to a different place, and we discover no misconduct in asking the questions.

Order and judgment affirmed.

BROWN, C. J.

I think a new trial should be granted to the end that the question of defendant's guilt or innocence may be passed upon by another jury uninfluenced by some of the objectionable features referred to in the opinion which, to my mind, were not clearly without prejudice to the substantial rights of defendant.

**W. J. DORAN v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.<sup>1</sup>**

January 15, 1915.

Nos. 18,906—(144).

**Carrier of passengers — negligence of servant — verdict.**

1. Where a suit to recover for personal injuries is brought by a passenger against a railway company and one of its employees, and a verdict is rendered against the company but in favor of the employee, such verdict determines that there was no negligence on the part of the employee which can be imputed to the company; but where the company is charged both with the negligence charged against the employee and with other negligence, such verdict also determines that the company was guilty of such other negligence.

**Passengers on freight train — duty of carrier.**

2. A railway company which receives passengers for transportation on freight trains must afford them a reasonable opportunity to enter and leave such trains in safety, and owes them the duty to guard against dangers which reasonable prudence could foresee and avoid.

**Refusal to instruct.**

3. The court properly declined to give instructions which were either inaccurate or not applicable to the facts of the present case.

**Verdict — admission of evidence.**

4. It is *held* that the evidence is sufficient to sustain the verdict and that there were no prejudicial errors in the admission thereof.

Action in the district court for Freeborn county to recover \$20,000 for injuries sustained while a passenger on defendant's train. The case was tried before Kingsley, J., and a jury which returned a verdict against defendant railway company for \$7,500. From an order

<sup>1</sup> Reported in 150 N. W. 800.

---

Note.—As to the effect of a verdict for a servant in an action against master and servant for latter's negligence or misfeasance, see notes in 9 L.R.A.(N.S.) 880 and 30 L.R.A.(N.S.) 404.

Upon the risks assumed by passenger on freight train, see note in 19 L.R.A. 310. 128 M.—13.

denying its motion for judgment notwithstanding the verdict or for a new trial, defendant railway company appealed. Affirmed.

*George W. Peterson, Norman E. Peterson and James B. Sheean,*  
for appellant.

*Dunn & Carlson,* for respondent.

TAYLOR, C.

Plaintiff purchased a ticket for the purpose of taking passage from Madelia to Lake Crystal on a freight train of defendant railway company, and was informed by the ticket agent that the caboose probably would not stop at the station, and that he had better go down in the yard and get on board. The caboose with a bad order car coupled on behind was at the rear of the train. Plaintiff walked along the track to the caboose and attempted to enter the front door but found it locked; he went to the rear door but found that also locked; he placed his grip and coat upon the rear platform and then stepped down upon the ground and waited. The train crew had detached the engine and several cars from the remainder of the train and were engaged in switching. After plaintiff had waited for about half an hour, the cars attached to the engine were backed down and coupled to the remainder of the train, and a brakeman came down to the caboose and entering it at the front door passed through and unlocked the rear door from the inside. Plaintiff and the brakeman differ as to what followed.

Plaintiff testified that he heard the brakeman unlocking the door, and started up the steps to the platform, but, meeting the brakeman coming out with a flag in his hand and apparently in a hurry, stepped back upon the ground to allow him to pass; that he, plaintiff, inquired whether they would pull out soon, and was answered "yes, you better get on;" that he started up the steps and, while in the act of stepping upon the platform and as he was reaching for his grip and coat, the train, without warning, suddenly started with a jerk which threw him upon the ground in such a manner that his left arm was run over and cut off by the car attached to the rear of the caboose.

The brakeman testified that he opened the rear door and found plaintiff standing on the platform; that in response to an inquiry he

told plaintiff they were going as quick as they could couple up; that he went down and connected the air hose between the caboose and the bad-order car; that he went back into the caboose and got a flag and a torpedo; that when he came out this time plaintiff was at the edge of the platform in front of him and stepped down upon the ground out of his way; and that he started back to flag an incoming passenger train, but hearing an outcry looked back and saw plaintiff lying on the ground with his arm under the wheels of the bad-order car. In short the brakeman insists that he entered and left the caboose twice, and that plaintiff was upon the platform and remained there until he left it the second time; while plaintiff insists that the brakeman entered and left the caboose only once, and that he, plaintiff, was not upon the platform after the arrival of the brakeman and never at any time had an opportunity to enter the caboose.

Plaintiff, alleging that the company, the engineer, and the brakeman were guilty of negligence, brought this suit against them for damages. At the trial the action was dismissed as to the brakeman, but was submitted to the jury as to the company and the engineer. The jury returned a verdict against the company but in favor of the engineer. The company made the usual alternative motion for judgment *non obstante*, or for a new trial, and appealed from the order denying its motion.

The company contends that the verdict in favor of the engineer also exonerated the company. It is true that the finding that the engineer had not been negligent relieves the company from the charge of negligence insofar as such charge is based upon alleged wrongful or improper acts on his part, but the negligence charged against the company is not limited to the negligence of the engineer. That the train was negligently started, without warning, while plaintiff was in the act of boarding it, and before he had been afforded a reasonable opportunity to enter the caboose, is the gravamen of the charge against the company. The train was under the control of the conductor; the signal to start was given by the conductor; and it was the duty of the engineer to obey the order given him. The question as to whether he was negligent in the manner in which he executed the order was duly submitted to the jury and decided in his favor. This

determined that there was no negligence on the part of the engineer which could be imputed to the company, but did not determine that the company was free from negligence in causing the train to be started at the time and under the circumstances shown by the evidence. The question as to whether the company negligently caused the train to be started, while plaintiff was in the act of boarding it, was submitted to the jury, who found against the company; and both the complaint and the evidence are sufficient to sustain the verdict, notwithstanding the fact that no negligence can be imputed to the company on account of the manner in which the engineer executed the order given him. *Webster v. Chicago, St. P. M. & O. Ry. Co.* 119 Minn. 72, 137 N. W. 168.

The company also contends that the injury to plaintiff resulted from a danger incident to the operation of freight trains, and that plaintiff, by seeking passage upon a freight train, assumed the risk of such injury; also that plaintiff was guilty of contributory negligence in attempting to board the train at the time and in the manner stated.

While passengers upon such trains assume the discomforts and risks necessarily attending that mode of conveyance, the carrier is required to exercise as high a degree of care for their safety as is consistent with the proper operation of the train. *Schultz v. Minneapolis & St. L. R. Co.* 123 Minn. 405, 143 N. W. 1131. A railway company which receives passengers for transportation on freight trains must provide a reasonable and sufficient opportunity for them to enter and leave such trains in safety. The passengers do not go on board at their peril, but the carrier owes them the duty to guard against all dangers which reasonable prudence could foresee and avoid.

The company argues, in effect, that it was under no obligation to look out for the safety of plaintiff, at the time of the accident, for the reason that the switching operations had not been completed, that the movement of the train was merely for the purpose of getting it out of the way of an incoming passenger train, and that the train was not ready to start out on its trip. Such appears to have been the fact, but this fact was known only to the conductor; it was not known either to plaintiff or to the brakeman, both of whom supposed

that the train was about to "pull out." Under the circumstances disclosed by the evidence, the questions involved were for the jury, and no persuasive reason appears for disturbing their verdict.

The failure of the court to give two instructions requested by the company is urged as error. The first of these was to the effect that a passenger, who "voluntarily and unnecessarily takes a position upon the platform of the car while the train is in motion," is guilty of negligence. Omitting to give this request was not error, for the reason that it refers to a situation not shown to exist in the present case. The second reads as follows:

"If you find that the plaintiff did not go inside of the caboose car when there was opportunity so to do, but instead went down on the ground and was injured in attempting to get back onto the car, this would be contributory negligence on his part and would bar recovery."

This apparently assumes that plaintiff had an opportunity to enter the car, which he denied. It states, as a matter of law, that he could not recover, if he had such opportunity, and stepped down upon the ground instead of availing himself of it. The only basis for this request is the testimony of the brakeman that plaintiff was upon the platform when the car was unlocked, and remained thereon until the brakeman came out of the car the second time, and then stepped down upon the ground to permit the brakeman to pass. Assuming that such were the facts, we think the court could not say, as a matter of law, that they barred plaintiff from recovery. They tended to prove negligence but were not conclusive evidence thereof. The jury were entitled to consider them in connection with all the other facts and circumstances, and to determine from the whole case whether plaintiff was guilty of contributory negligence. What would constitute contributory negligence on his part was not clearly defined in the general charge, and, if a request properly defining his duties under the circumstances, had been presented, it should have been given; but there was no error in refusing the request in question.

The company also complain that plaintiff was permitted to testify that he was married. He was asked if he was married and answered "yes." The inquiry proceeded no further. Such inquiries are usually objectionable as possibly having an effect upon the jury in fixing

the amount of damages, but, in the present case, other testimony, particularly that of his wife, disclosed that he was married, and his testimony to the same effect was clearly without prejudice. *Bahr v. Northern Pacific Ry. Co.* 101 Minn. 314, 112 N. W. 267.

The order appealed from is affirmed.

---

**S. F. BOWSER & COMPANY v. P. F. FOUNTAIN and Another.<sup>1</sup>**

January 15, 1915.

Nos. 18,913—(147).

**Order for goods — parol evidence.**

1. Where a written order for goods is given, it is competent to prove that at the time of delivery of the order the parties agreed that it should become operative only upon the happening of a contingency or the performance of a condition.

**Offer and acceptance.**

2. An offer to buy which requires acceptance must be accepted within a reasonable time. Where it is understood that the goods to be bought are wanted within two weeks, evidence that an offer to buy was not accepted until 30 days after it was made, sustains a finding that acceptance was not within a reasonable time.

**Custom — notice to customer.**

3. A custom of business houses to take at least 10 days to investigate the credit of a new customer, could not bind the defendants in the absence of proof that they had knowledge of the custom, or that it had become so general, long-established and notorious that they must be presumed to have knowledge of it.

Action in the district court for Clay county to recover \$162 for goods sold and delivered. The case was tried before Nye, J., and a jury which returned a verdict in favor of defendants. From an

<sup>1</sup> Reported in 150 N. W. 795.

order denying plaintiff's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

*Edgar E. Sharp*, for appellant.

*W. George Hammett*, for respondent.

HALLAM, J.

Plaintiff is located at Fort Wayne, Indiana. Defendants deal in automobile supplies at Hawley, Minnesota. On May 30, 1912, plaintiff's traveling salesman called upon defendants at Hawley and took their written order for a gasoline storage outfit. The order was, by its terms, subject to acceptance at Fort Wayne, Indiana. No time was specified in the writing either for its acceptance or for the shipment of the goods. Defendants' evidence is to the effect that the order was never accepted, save that shipment of the goods was made and invoices mailed to defendants June 28. The goods arrived at Hawley July 16. Defendants refused to receive them and plaintiff brought this action for goods sold. Defendants made two defenses: First, that the order was given upon a condition which was never performed, or a contingency that never happened; and, second, that in no event was the order accepted within a reasonable time. The court submitted both issues to the jury. The jury found for the defendants. Plaintiff moved in the alternative for judgment or for a new trial. Both motions were denied, and plaintiff appeals.

1. Whether this order, taken in connection with words or acts constituting an acceptance, was intended to form a complete contract between the parties, we need not determine. Under the decisions on this subject, which are collected in *McLoone v. Bruschi*, 119 Minn. 286, 138 N. W. 35, this proposition may not be free from doubt. We may assume, however, that such was the intention of the parties.

It is an elementary proposition "that where, in the absence of fraud, accident or mistake, the parties have deliberately put their contract into a writing which is complete in itself, and couched in such language as imports a complete legal obligation, it is conclusively presumed that they have introduced into the written instrument all material terms and circumstances relating thereto."

Wheaton Roller-Mill Co. v. John T. Noye Mnfg. Co. 66 Minn. 156, 159, 68 N. W. 854, 855.

It is also well settled that "where a contract is silent as to the time of performance, the law implies that it is to be performed within a reasonable time; and, if the contract be in writing, parol evidence of an antecedent or contemporaneous oral agreement is inadmissible to vary the construction to be thus legally implied from the writing itself." Liljengren F. & L. Co. v. Mead, 42 Minn. 420, 424, 44 N. W. 306, 308.

Another rule equally well settled, however, is that, in case of a simple contract in writing, it is competent to show by parol that, notwithstanding the delivery of the writing, the parties intended and agreed that it should be operative as a contract only upon the happening of a future contingent event, or the performance of a condition. Westman v. Krumweide, 30 Minn. 313, 15 N. W. 255; Merchants Exchange Bank v. Luckow, 37 Minn. 542, 35 N. W. 434; Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995; Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1057; Samuel H. Chute Co. v. Latta, 123 Minn. 69, 142 N. W. 1048. The purpose and effect of such evidence is to prove a condition precedent to the attachment of any obligation under the written instrument. This is not to vary the written instrument, but to prove that no contract was ever made, that its obligation never commenced. Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995. This doctrine is not inconsistent with Liljengren F. & L. Co. v. Mead, *supra*, for the evidence there considered did vary the implied terms of the contract. Neither is Graham v. Savage, 110 Minn. 510, 126 N. W. 394, 136 Am. St. 527, 9 Ann. Cas. 1022, inconsistent with the doctrine above stated. In that case the court simply held that parol evidence is not admissible to show that a writing which purports to be a complete written contract is not to be observed according to its terms, but is in fact a sham, designed to be used merely for the purpose of deceit and fraud.

We come now to the question whether there is in this case evidence, to submit to the jury, of an agreement that the delivery of the order was conditional, and that it should become operative only on the happening of a contingency or the performance of a condi-

tion. We think there is. The testimony of the defendants was to the effect that plaintiff's salesman was advised that defendants wanted the outfit for the installation in a garage then under construction; that they wanted it delivered before the floor of the garage was in, and for that reason wanted it within two weeks time; that the salesman did not know whether he could make delivery within that time or not. He said he could do so if he could get the outfit in Minneapolis, but that, if it became necessary to ship from Fort Wayne, it would be impossible to do so, and that defendants then gave the written order "on condition \* \* \* that if he could deliver the goods in two weeks time, or thereabouts, it would be a deal; otherwise it would be thrown out." We think this evidence was sufficient to sustain a finding that the delivery of the order was conditional upon ascertainment of the fact that the goods could be delivered in two weeks or thereabouts.

The defense above considered if established was sufficient to sustain the verdict for defendant, but inasmuch as the court submitted both defenses to the jury, and the jury returned only a general verdict for defendant, it is impossible to determine whether the jury found this defense, or the other one, established. It is accordingly necessary to consider the sufficiency of the second defense.

2. The second defense was that, independent of this verbal understanding, the offer was not accepted within a reasonable time. It is elementary that an offer such as this, which requires acceptance by the other party to the negotiation, must be accepted within a reasonable time. *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88; *Reid v. Northwestern I. & W. Co.* 79 Minn. 369, 82 N. W. 672. Defendants' evidence is that this was not accepted until about 30 days after it was given, and then only by shipment of the goods and mailing of an invoice. The order in this case by its terms called for an acceptance, and, under the circumstances disclosed by the evidence, the jury might find that it was not accepted within a reasonable time.

3. Plaintiff complains that the court sustained objections to evidence offered by it that the time usually required by a mercantile

establishment to investigate the credit of a firm with whom they have not previously done business is from 10 days to four weeks.

Plaintiff was allowed to prove that it took in this case two weeks to obtain the usual credit information in reference to defendants, that the investigation was made through the usual channels and in the way usually followed by plaintiff. Proof of a custom among commercial houses to require for such investigation a length of time varying all the way from 10 days to four weeks could hardly be said to establish any custom at all, unless it be a custom to require at least 10 days for that purpose. Such a custom, if binding on the defendants, might be of some value as evidence in this case. But under well settled rules the custom of business houses could not bind these defendants in the absence of proof that they had knowledge of the custom, or that it had become so general, long established, and notorious that they must be presumed to have knowledge of it. *Nippolt v. Firemen's Ins. Co. of Chicago*, 57 Minn. 275, 59 N. W. 191; *Earl Fruit Co. v. Thurston Cold-Storage & Warehouse Co.* 60 Minn. 351, 62 N. W. 439. There is no proof or offer of proof of any such facts in this case. The objection to this testimony was properly sustained.

Order affirmed.

PHILIP E. BROWN, J. (dissenting).

I dissent from the application to the facts of this case of the doctrine announced in *Westman v. Krumweide*, 30 Minn. 313, 15 N. W. 255; *Merchants Exch. Bank v. Luckow*, 37 Minn. 542, 35 N. W. 434, and similar cases, the dangerous character of which is adverted to by Mr. Justice Mitchell in *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 115, 41 N. W. 1026, 3 L.R.A. 796, 12 Am. St. 743, and by Mr. Justice Jaggard in *Graham v. Savage*, 110 Minn. 510, 513, 126 N. W. 394, 136 Am. St. 527, 19 Ann. Cas. 1022. The danger, however, does not inhere so much in the doctrine itself as in its application in accordance with the distinction on which it is based, namely, between parol proof of a collateral independent condition precedent to the operation of the agreement as a contract, and like proof "that the contract itself

contained a condition not expressed in the writing," or different from one included therein. To extend the exception under which the former is admissible so as to render the latter competent would destroy the parol evidence rule; for then there would be no basis for distinction between what terms and conditions of a written contract could be varied or destroyed by parol, and what not.

Immediately upon its acceptance, the order here involved became a complete contract expressly purporting to cover all the agreements of the parties, and, with the implication of the law as to the time of delivery, nothing remained to be supplied by parol. Thus it was squarely within the holding of *Kessler v. Smith*, 42 Minn. 494, 44 N. W. 794, that an accepted order for goods constitutes a complete written contract, and likewise within the implied holding of *McLoone v. Bruschi*, 119 Minn. 286, 138 N. W. 35, and cases there cited, that where the writing purports to cover all the agreements of the parties and contains the essential elements of a contract, it cannot be varied by parol, the ground of the admission of the evidence in that case being that it was "manifest that the parties did not intend the order in question as a complete expression of their contract." The fact that the order did not express the time for delivery is immaterial; for in such case the law implies a reasonable time, which implication cannot be contradicted by parol. *American Bridge Co. of New York v. American District Steam Co.* 107 Minn. 140, 144, 119 N. W. 783.

The greatest effect which can be accorded the evidence admitted by the trial court is that the parties made a prior or contemporaneous oral agreement that, unless the goods were delivered within a certain time, the order should not stand; which is plainly a variance of the implied agreement that the delivery should be made in a reasonable time, and this whether the order be taken as having become an existing contract immediately upon its delivery to plaintiff's agent, or only upon its acceptance by plaintiff itself within a reasonable time; the attempt in either case being to engraft upon a complete written contract a parol condition concerning a matter purporting to be fully covered thereby. The distinction between such a case and one in which a party is allowed to prove that, by reason of some collateral

agreement or understanding, a contract complete in form never became operative, is that in the latter the whole contract is held in abeyance until the happening of some condition precedent, upon which its terms become effective as written, while in the former an indulgence of the exception would allow an essential term of the contract to be varied, or perhaps destroyed, by a prior or contemporaneous oral condition subsequent.

On this point I think the case is ruled, in accordance with the views above expressed, by *McCormick Harvesting Mach. Co. v. Wilson*, 39 Minn. 467, 40 N. W. 571; *Minneapolis Threshing Mach. Co. v. Davis*, *supra*; *Kessler v. Smith*, *supra*; *Graham v. Savage*, *supra*; *Samuel H. Chute Co. v. Latta*, 123 Minn. 69, 142 N. W. 1048.

BUNN, J.

I concur in the views expressed in the dissent of Mr. Justice Philip E. Brown.

---

JESSIE B. DAVISON v. HARRIET B. RESSLER and Others.<sup>1</sup>

January 15, 1915.

Nos. 18,942—(159).

**Injury to janitor.**

1. A janitor who had stepped out upon a window ledge to clean the outside of the window, in attempting to raise it after completing his work, lost his balance and fell to the pavement. He had performed the same work under the same conditions for some years and was entirely familiar with the situation.

**Assumption of risk.**

2. *Held* that he assumed the risk.

<sup>1</sup> Reported in 150 N. W. 802.

---

Note.—The authorities on the question of the servant's assumption of obvious risks of hazardous employment are gathered in a note in 1 L.R.A. (N.S.) 272.

Action in the district court for Hennepin county by the administratrix of the estate of D. Arthur Davison, deceased, to recover \$7,500 for the death of her intestate. The case was tried before Jelley, J., and a jury which returned a verdict in favor of plaintiff for \$3,500. Defendants' motion for judgment notwithstanding the verdict was granted. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Affirmed.

*Axel A. Eberhart, Ludwig Arctander and Gunnar H. Nordbye,*  
for appellant.

*Harlan P. Roberts, L. J. Van Fossen and E. C. Garrigues,*  
for respondents.

TAYLOR, C.

Plaintiff's husband, D. Arthur Davison, was the janitor of a two story brick building in the city of Minneapolis. While cleaning a window on the second floor of the building, he fell to the pavement and was killed. Plaintiff, as administratrix of his estate, brought suit for damages and had a verdict. Thereafter a motion for judgment notwithstanding the verdict was granted, and judgment was entered in favor of defendants. Plaintiff appealed.

The window in question was 60 inches in width and 38 inches in height, and had been provided with counterbalancing weights to aid in raising and lowering it. One of these weights had become detached and in consequence two persons, one at each end, were usually required to raise it. On the day of the accident, Mr. Hyland, one of the occupants of the building, at the request of Davison, assisted him in raising it. Davison stepped outside upon the window ledge, which was 16 inches in width, closed the window and washed the outside of it. He then rapped upon the window, and Hyland came to assist him in again raising it. Davison bent over and placed his fingers under the window on the outside, while Hyland lifted at the other end of the window on the inside. For some unknown reason, Davison suddenly withdrew his hand and straightened up, and, in doing so, lost his balance and fell. The window had been in the same condition for four or five years. Mr. Davison

had been janitor of the building, with some intermissions, for about six years. He had full knowledge of the condition of the window and had cleaned it in the same manner regularly. The defendants became owners of the property a few months before the accident, but never occupied it themselves, and there is no evidence that either they or their agent ever knew that the weight had become detached. There was no other defect in the window. When they acquired the property Davison was in charge as janitor, and they continued him in that position without giving him any instructions as to his duties.

The danger was inherent in the nature of the work and was perfectly apparent. There was no hidden or unknown danger; nothing broke and nothing gave way. Mr. Davison entered upon an extremely hazardous undertaking, but he had performed the same work in the same manner upon the same window and under the same circumstances, at regular intervals, for years, and was entirely familiar with all the attending conditions.

The doctrine of the assumption of risks is thoroughly established as a part of the law, and, while it is not favored, it is always applied in cases which are fairly within the rule. It has been applied in the so-called "gravel pit" cases of which *Olson v. McMullen*, 34 Minn. 94, 24 N. W. 318, is an example. It has also been applied in numerous other cases of which the following are examples: *McKenna v. Chicago, M. & St. P. Ry. Co.* 92 Minn. 508, 100 N. W. 373, 101 N. W. 178; *Englund v. Minneapolis, St. P. & S. S. M. Ry. Co.* 108 Minn. 380, 122 N. W. 454; *Tomczek v. Johnson*, 110 Minn. 320, 125 N. W. 268; *McCutcheon v. Virginia & R. L. Co.* 114 Minn. 226, 130 N. W. 1023; *Lundberg v. Minneapolis Iron Store Co.* 115 Minn. 174, 131 N. W. 1016; *Anderson v. Fred Johnson Co.* 116 Minn. 56, 133 N. W. 85; *Johnson v. Northern Pacific Ry. Co.* 125 Minn. 29, 145 N. W. 628.

The syllabus in the *Olson* case states the rule as follows:

"A servant cannot recover from his master for an injury sustained in doing dangerous work which he is set to do, if the danger is of such character that it must be as apparent to the servant as to the master."

The Englund case quoting from the United States Supreme Court states the rule as follows:

"Where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question (of the assumption of the risk) becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly."

The undisputed facts bring the present case clearly within the rule, and the trial court, in rendering judgment for defendants, correctly performed its duty.

Judgment affirmed.

---

**ALVA R. HUNT v. MEEKER COUNTY ABSTRACT &  
LOAN COMPANY.<sup>1</sup>**

January 15, 1915.<sup>2</sup>

Nos. 18,945—(160).

**Partition — agreement by cotenants.**

1. Cotenants may make any agreement they choose in respect to the use by each other of the common property, but such agreements do not constitute a partition thereof, unless they provide or contemplate that title to specific portions thereof shall vest in such cotenants in severalty.

**Same.**

2. A cotenant has the right to compel a partition of the common property, unless such right has been suspended or waived by some agreement, in respect to the property, made by himself or by one through whom he claims.

<sup>1</sup> Reported in 150 N. W. 798.

<sup>2</sup> An opinion filed April 16, 1915, will be found on page 539.

Same.

3. Such right may be suspended for a limited time by express agreement, or by acquiring the property for, or devoting it to, some purpose which will be defeated by a partition; but such right is not suspended by the existence of an interest in the property, or of a right to occupy or use it, which may continue and be given effect notwithstanding the partition.

Same.

4. Under and pursuant to a contract made at the time of the construction of the building in controversy, plaintiff is in possession of the second floor thereof and defendant of the first floor thereof. It is *held* that their respective rights of occupancy under this contract may exist after partition the same as before; and that plaintiff may compel a partition, but that such partition will be subject to such rights of occupancy.

Action in the district court for Meeker county for the cancellation of a lease and a sale of the premises. The case was tried before Qvale, J., who made findings and dismissed the action. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

*Alva R. Hunt* and *Ernest W. Campbell*, for appellant.

*R. H. Dart* and *E. D. Fitchette*, for respondent.

TAYLOR, C.

On March 30, 1885, E. P. & H. I. Peterson, then owners of lot 26 of block 59 in the village of Litchfield, of the first part, and H. S. Branham, of the second part, entered into a written agreement "for the purpose of jointly erecting" a two-story brick building on said lot, "the first story thereof to be used by the said H. S. Branham for a banking, abstract and real estate office, and the second story thereof to be used by the parties of the first part for a printing office and law office or other suitable office for business." The agreement provided that the Petersons should convey "an undivided one-half interest" in the lot to Branham for the sum of six hundred dollars to be paid by him; that "the parties hereto \* \* \* will together cause to be erected on said lot 26 of block 59 a substantial brick building of two stories and a basement;" that "the first story thereof shall be made suitable for a bank and abstract office (except that the bank

fixtures and vault, if any, shall be constructed and paid for by said H. S. Branham alone) and the second story thereof shall be fitted up suitable for printing office and law office;" that "the expenses of constructing the same \* \* \* shall be equally borne, to-wit, one-half by the parties of the first part and one-half by the party of the second part;" and that

"When said building is completed the same and the lot on which it stands shall be the property of the parties hereto in equal undivided shares; and the said H. S. Branham shall have the use and occupation of the first story thereof for a rental value of three hundred sixty dollars per annum, and the said first parties shall have the use and occupation of the second story thereof for a rental value of two hundred dollars per annum and after deducting taxes, insurance and necessary repairs on said building from the said annual surplus of rental of said first story the amount remaining shall be equally divided by the parties, and the basement shall be rented to the best advantage and the proceeds equally shared by the parties hereto."

The parties forthwith constructed and completed the building under and in accordance with the agreement, and Branham, at his own expense, constructed a vault of brick and steel in the basement and first story thereof. At the completion of the building the Petersons executed a warranty deed conveying to Branham

"An undivided one-half interest in and to lot number twenty-six (26) in block number fifty-nine (59) in the village of Litchfield, according to the plat thereof on file and of record in the office of the register of deeds in and for said Meeker county. Also the whole and entire book vault as the same now is in the basement and first story of the building on said lot. All subject to a contract of date March 30, 1885, by which the said second parties are to occupy the first floor of the building on said lot at a rental value of 360 dollars per year and the first parties are to occupy the second floor thereof at a rental value of 200 per year."

Branham took possession of the first story of the building, and he and those holding under him have continued in possession thereof ever since; the Petersons took possession of the second story, and they and those holding under them have continued in possession

thereof ever since. The rights in the property possessed by Branham have passed to and vested in defendant; the rights of the Petersons have passed to and vested in plaintiff. Instead of paying for taxes, insurance and repairs out of the amount by which the agreed rental for the first story exceeded that for the second story and then dividing the remainder of such excess, the occupants of the first story have always paid the full one-half of such excess to the occupants of the second story, and each party has paid his own taxes and insurance and for such repairs as he caused to be made upon that portion of the premises occupied by himself; and the parties jointly have borne the expense for repairs made to the roof or basement. The co-owners followed this course for some 20 years, but, after plaintiff acquired the Peterson interest, he insisted that defendant contribute toward repairs on the second story, and a controversy arising he brought this suit for partition. He alleged that the property could not be divided, and asked that the contract as to occupancy be cancelled, and that the property be sold and the proceeds thereof be divided between himself and defendant.

Defendant contends that plaintiff is not entitled to partition and bases such contention upon two grounds: First, that the agreement that one co-tenant should have the exclusive possession and use of one portion of the building, and that the other should have the exclusive possession and use of another portion thereof, constituted a partition of the property voluntarily made by the parties themselves; second, that, if the contract did not make a partition of the property, the right given to each party to use a particular portion thereof for the purpose and in the manner specified therein, constituted a waiver of the right to enforce partition. The trial court held that plaintiff was not entitled to partition and dismissed the suit.

It is clear that neither the contract, nor the deed made pursuant thereto, constituted a partition of the property. Each cotenant continued to hold the title to an undivided one-half of the entire premises. Neither became vested with the entire title, in severalty, to any portion thereof, and the contract did not contemplate that he should. Cotenants may make any agreement they choose in respect

to the use by each other of the common property. 17 Am. & Eng. Enc. (2d ed.) 672. But such agreements do not amount to a partition of the property, unless they provide or contemplate that title to particular portions thereof shall vest in the respective co-owners in severalty. The contract in question gave each of the parties the right to the exclusive use of a certain portion of the premises, but this division was only partial, even in respect to the right of occupancy, for the basement was not assigned to either. The contract provides: "When said building is completed the same and the lot on which it stands shall be the property of the parties hereto in equal undivided shares." By the provision for equalizing the difference in rental value between the first and second floors, and the provision for dividing the rentals to be received from the basement, the contract further recognized that each party retained his interest in the entire property. The contract cannot be given effect as constituting a partition. It did not vest either party with title in severalty to any portion of the premises.

The statute gives a cotenant the right to bring an action for a partition of the common property, or for a sale thereof if it appears that a partition is impracticable. G. S. 1913, §§ 8028, 8041. By virtue of this statute, a cotenant has the absolute right to compel a partition or sale, unless such right has been suspended or waived by some agreement in respect to the property made by himself or by one through whom he claims. It is well settled that cotenants may, by an express contract to that effect, suspend or waive, for a limited time, the right to enforce a partition. *Roberts v. Wallace*, 100 Minn. 359, 111 N. W. 289, 117 Am. St. 701; *Yglesias v. Dewey*, 60 N. J. Eq. 62, 47 Atl. 59; *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641; *Coleman's Appeal*, 62 Pa. St. 252; *McInteer v. Gillespie*, 31 Okla. 644, 122 Pac. 184, Ann. Cas. 1913E, 400. It is probable that such suspension cannot be made perpetual. *Haeussler v. Missouri Iron Co.* 110 Mo. 188, 19 S. W. 75, 16 L.R.A. 220, 33 Am. St. 431.

Where the property has been acquired for, or devoted to, some purpose which would be defeated by a partition made at the present time, the right of partition is suspended to the extent necessary to

avoid defeating such purpose, although there is no express stipulation to that effect. *Dee v. Dee*, 212 Ill. 338, 72 N. E. 429; *Avery v. Payne*, 12 Mich. 540; *Hunt v. Wright*, 47 N. H. 396, 93 Am. Dec. 451; *Latshaw's Appeal*, 122 Pa. St. 142, 15 Atl. 676, 9 Am. Rep. 76; *Baldwin v. Humphrey*, 44 N. Y. 609; *Martin v. Martin*, 170 Ill. 639, 48 N. E. 924, 6 Am. St. 411.

But the power to require partition is not suspended by the existence of an interest in the property, or of a right to occupy and use it, which may continue and be given effect notwithstanding the partition. If the outstanding rights in the property are such that the enjoyment thereof can be secured to the holder of such rights by making the partition subject thereto, the cotenant may enforce either a division or a sale of the property subject to such outstanding rights. In *Fisher v. Dewerson*, 3 Metc. (Mass.) 544, it was held that a covenant that a parcel of land should be occupied by the cotenants in common as a yard did not bar partition, as the right of occupancy, in the nature of an easement, would exist thereafter as it existed before. In *Hooker v. McLeod*, 70 Vt. 327, 41 Atl. 234, a bulkhead and flume, through which the joint owners drew water to operate their respective mills, was partitioned by allowing the construction of dividing walls in the flume and assigning to each his moiety thereof as so divided. In *Whitney v. Kendall*, 63 N. H. 200, defendant, the owner of the land, conveyed a half interest therein to plaintiff on condition that, during the life of defendant, plaintiff should not dispose of the premises, nor permit them to be occupied by any person other than plaintiff and defendant. Partition was granted, the court remarking "after partition, the condition will be as effective as before." In *Hoyt v. Kimball*, 49 N. H. 322, the right reserved by a grantor to enter and abate any building constructed otherwise than as provided in the deed, did not bar partition. In *Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222, one cotenant was the owner of a building erected upon the land under a ground lease which did not expire for several years. The court held that the shares of the other cotenants were subject to this lease, but, as to his own share, that his rights under the lease had merged in his title; and authorized a sale of the property, the purchaser to take this

cotenant's share free from the ground lease and the other shares subject thereto.

The contract in controversy contains no provision expressly suspending the right of partition. The deed by its terms is subject to the contract, and confers no greater rights than are provided for in the contract. The recital in the deed of some of the provisions of the contract serves to identify the instrument referred to, but does not eliminate or nullify those provisions of the contract omitted from the deed. The parties are cotenants in the title, but are not cotenants in the respective rights of occupancy given them individually by the contract. Whatever may be the nature and extent of such rights, they may still subsist after a sale has been made in the partition proceeding, and no reason occurs to us why a sale may not be made subject to such rights. It follows that plaintiff may compel partition by a division of the land, if practicable, or, if a division be impracticable, by a sale thereof; but the partition must be made subject to the rights of occupancy conferred by the contract. The contract contains no express provision as to the length of time during which such rights shall continue, but they have not yet been terminated, and will remain after partition the same as before, unless terminated by agreement or in some manner provided by law. The question as to the manner in which they may be terminated is not now before the court and cannot be determined herein.

Judgment reversed.

---

FRANK SCHULZ v. LEWIS DUEL.<sup>1</sup>

January 15, 1915.

Nos. 18,954—(172).

**Negligence of farmer — evidence.**

Plaintiff was injured by the running away of a team with which defendant

<sup>1</sup> Reported in 150 N. W. 786.

was husking corn in his corn field. Defendant was husking beside the wagon with the reins fastened to the side of the wagon. It is conceded that this is a proper and customary manner of working with an ordinary team. Held, there is no evidence that this team was a runaway team or so wild or unsafe as to make it negligence for defendant to use it for husking corn in the usual manner.

Action in the district court for Redwood county to recover \$5,044 for injuries sustained while in defendant's employ and \$99.40 for wages. The case was tried before Olsen, J., and a jury which returned a verdict in favor of plaintiff for \$2,107.71. From an order denying defendant's motion for a new trial, he appealed. Reversed.

*Frank Clague and T. Otto Streissguth, for appellant.*

*Albert H. Enersen, for respondent.*

HALLAM, J.

In the fall of 1912 plaintiff was employed to husk standing corn on the farm of defendant. Defendant and his son were similarly employed. The method was as follows: Each husker had a team and wagon. He husked two rows of corn at a time, throwing the corn into the wagon which was moved along astride the second "empty row" to the right. The reins were fastened to the left side of the wagon. One Sunday afternoon in December plaintiff and defendant's son each went out with a team to husk corn. Defendant took another team and followed. Defendant's son was in the lead, plaintiff came along behind him, and defendant was about 40 rods behind plaintiff. The result was that defendant's team was astride one of the rows upon which plaintiff was husking. Soon after defendant commenced, and while he was working beside the wagon, the team started to run, from some cause apparently unknown and ran straight down the corn row and over plaintiff, causing the injury complained of. Plaintiff sued for damages. The jury found in his favor. Defendant appeals from an order denying a motion for a new trial.

Plaintiff was in defendant's employ, and defendant was under obligation to use reasonable care not to injure him, and to use reasonable care to protect the safety of the place in which plaintiff was

obliged to work. His failure to do so would be negligence. The question is, was he negligent?

The evidence shows that the method followed by both plaintiff and defendant was the customary method of husking corn in that vicinity, and no claim is made that this method was ordinarily an improper or negligent one. The day was cold and a high wind was blowing, but no claim is made that there was any negligence in husking corn according to the customary method on this day. The allegation of negligence is bottomed on the claim that this team was a "wild and unsafe or runaway team" and that defendant knew or was chargeable with knowledge of that fact. This was the sole ground of negligence which the trial court submitted to the jury, and he specifically instructed them that if they should find "that the team which ran away and injured the plaintiff was not a wild and unsafe or runaway team, or not known to the defendant to be unsafe or to have runaway propensities, then the plaintiff cannot recover."

It appears to us there is no evidence sufficient to sustain a finding that this team was known to be a runaway team or wild or unsafe. The evidence submitted to prove this was as follows:

Defendant purchased this team in the spring of 1911. There is some evidence of two occurrences which plaintiff characterizes as runaways while the team belonged to a former owner. It is needless to go at length into these occurrences, since there is no evidence that defendant had any knowledge of them. The only evidence reflecting on the quiet disposition of the team of which he was shown to have any knowledge was that of an occurrence in September, 1911, or about 14 months before the accident. On that occasion defendant's 14 year old daughter was driving the team hitched to a hay rake. The ring came off one end of the neck yoke, letting the tongue drop down, and the team ran about 100 feet to an embankment where they were stopped by the tongue running into the ground. This young girl kept her seat, hung on to the reins, and managed to recover control of the team without assistance. The harness was not broken. The tongue of the rake was broken, but the rake was taken to the house and fixed up, the team was hitched to the rake

again, and the same young girl again drove them all through haying time. This incident did not in any sense characterize this team as a runaway team or as wild or unsafe. It is a matter of common knowledge that any team will take fright at the falling of a wagon tongue. Had the team been wild or unsafe or a runaway team, the consequences must necessarily have been much more serious than they were. We are not unmindful of the fact that horses that have once run away are less safe thereafter. But it seems clear that this incident was not such as to render this an unsafe team. There is evidence that this same girl and another sister a little older subsequently drove this team in the course of the farm work, and in the course of such work allowed them to stand unhitched, and that they showed no disposition to run away. During the fall of 1911 defendant and his daughter husked 52 acres of corn with this team, fastening the lines in the same manner as on the day of the accident, and in the fall of 1912 defendant used them to a considerable extent in the same manner. At no time did they ever manifest any disposition to run away.

There was some evidence on the part of plaintiff that defendant's son had told him that the reason his father always drove this team and always husked by himself was that "the team is too high-lifed," and that defendant's daughter told him after the accident "that isn't the first time that team has run away." Defendant was not present at any of these conversations and there is no evidence that he had any knowledge of them. These alleged admissions of defendant's children cannot bind defendant and have no probative force against him.

There are many cases in the books involving the question of liability of the owner of horses for injuries caused by their running away. Some of them involve the question of negligence by reason of allowing horses to stand unattended and unhitched on a street or a public highway. Many of these will be found collected in *Griggs v. Fleckenstein*, 14 Minn. 62 (81), 100 Am. Dec. 199; *Moulton v. Lewiston B. & B. St. Ry.* 102 Me. 186, 66 Atl. 388, 10 L.R.A. (N.S.) 845; *Corona Coal & Iron Co. v. White*, 158 Ala. 627, 48 South. 362, 20 L.R.A. (N.S.) 958. They throw but little light on a

case like this. It is the rule of many cases that the fact that a horse is found running upon a public highway unattended gives rise to a presumption of negligence on the part of the owner. *Dennery v. Great Atlantic & Pacific Tea Co.* 82 N. J. Law, 517, 81 Atl. 861, 39 L.R.A.(N.S.) 574. This rule of presumption can have no application to this case, for it is conceded that there is no negligence in using an ordinary team in the manner in which defendant used this team on this occasion.

The sole question here is whether this team was one which required handling with special care, or, in other words, whether it was negligence to use this team in the manner customary with ordinary teams. We would not say that it was necessary for plaintiff to prove that the team was vicious in order to make out a case. A team might be so high spirited as to make it unfit for use for husking corn in the customary manner. But we are constrained to hold, on the record in this case, that the use of this team by defendant was not sufficient to charge him with negligence.

Plaintiff sued also for a balance due for services rendered by him in husking corn. This claim is unquestioned. The verdict should stand for the amount claimed in the complaint upon this cause of action. A new trial is granted upon the other issues in the case.

Order reversed.

---

SPERRY REALTY COMPANY v. MERRIAM REALTY  
COMPANY.<sup>1</sup>

January 15, 1915.

Nos. 19,051—(165).

**Broker — action for commission.**

Defendant owned land and gave to plaintiff, a real estate agent, the privi-

<sup>1</sup> Reported in 150 N. W. 785.

---

**Note.**—As to what constitutes performance of contract by a real estate broker to find a purchaser or effect an exchange of his principal's property which will entitle him to commissions, see note in 44 L.R.A. 593.

lege of making a sale thereof to a certain named person at a named price within a time specified. Plaintiff within the time specified contracted with the person named to sell the land to him at a price in excess of that named. The purchaser refused to complete the sale because of an easement that encumbered the land. It is *held*: Conceding, but not deciding, that plaintiff performed the terms of its agreement with defendant, and that the failure to consummate the sale was the fault of defendant, plaintiff is not entitled to recover the difference between the price specified and that named in the contract with the purchaser. There being no pleading or proof as to the value of plaintiff's services, it is not entitled to recover in this action.

Action in the district court for Ramsey county to recover \$5,000 as commission for making a sale of real estate. The answer was a general denial. The case was tried before Dickson, J., who made findings and ordered judgment in favor of defendant. From an order denying plaintiff's motion for a new trial, it appealed. Affirmed.

*Duxbury, Conzett & Pettijohn*, for appellant.

*John F. Fitzpatrick*, for respondent.

BUNN, J.

Plaintiff, a corporation engaged in the real estate business in St. Paul, brought this action to recover \$5,000 claimed as commission upon a sale of real estate belonging to defendant. The case was tried to the court without a jury, and the decision was that plaintiff take nothing by the action. A motion for a new trial was denied and plaintiff appealed from the order.

Plaintiff's claim of a right to commissions is based upon these facts. On September 1, 1910, defendant gave to plaintiff the following writing:

"In consideration of the efforts of the Sperry Realty Company to sell the same, the privilege of making a sale of the following described tract or parcel of land lying and being in the county of Ramsey, state of Minnesota, to-wit: The north sixty-five (65) feet of lots 6, 7 and 8, of block twenty-three (23), St. Paul Proper, at any time within ten (10) days from date hereof for a consideration of

fifty thousand dollars (\$50,000) all cash, is hereby given to said Sperry Realty Company, and it is understood and agreed that the option extended herein to the Sperry Realty Company is for the purpose only for the sale of said property to either Thomas C. or James C. Fulton or A. M. Thompson, clients of said Sperry Realty Company."

This "privilege of making a sale" or "option" was dated September 1, and was signed by an agent of defendant by its authority. There is no question that it was effective to give plaintiff the privilege of making a sale of the property at the price, on the terms and within the time stated, to either of the persons named.

On September 9, plaintiff notified defendant's agent that it had sold the property to A. M. Thompson, one of the persons named, and asked that the deed be prepared and abstract brought down to date and delivered to plaintiff. The abstract was procured and delivered by defendant. Thompson discovered therefrom that the property was encumbered by a 12-foot easement across the easterly end thereof, and for that reason refused to carry out the contract he had made with plaintiff for the purchase of the property. This contract was made September 9, and by its terms plaintiff in its own right and not otherwise agreed to sell and convey to Thompson and the latter agreed to buy, the property in question for the sum of \$55,000. Defendant knew nothing of the terms of this contract until October 20, 1911, after Thompson raised the objection of the easement. Plaintiff never entered into any contract with Thompson in which it acted as agent for defendant and for and on behalf of defendant, and never brought Thompson to defendant so as to afford defendant an opportunity to itself enter into a contract with him. No sale to Thompson was ever consummated.

It is clear that plaintiff, in its contract with Thompson, assumed to act as the owner of the property, and not as agent of the owner, and that it contracted in its own name to sell the property at an increased price. The theory of plaintiff is that it is entitled to recover the difference between the price named in the option agreement and that named in its contract with Thompson. This theory is un-

sound, in our opinion. There was no such agreement. Authority to sell at \$50,000 did not mean that plaintiff could sell at a greater sum and keep the difference. The excess price received would belong to the owner, in the absence of an agreement that the agent should have it. Conceding that plaintiff performed the terms of its agreement when it procured a purchaser ready, able and willing to buy on the terms stated, and disregarding the written contract with Thompson, it is still impossible to see on what theory plaintiff is entitled to recover the difference between what Thompson was willing to pay and the price named in the option. Plaintiff relies upon a letter written it by the agent of defendant who signed the option agreement, in which letter the agent stated that he expected plaintiff to obtain its commission from its purchaser. If this letter binds defendant, it does not help plaintiff's case. Neither directly nor by implication is it ground for holding that the agreement was that plaintiff should have as its commission all it could get over \$50,000. We would have difficulty in holding that the failure to make the sale to Thompson was defendant's fault. Though the option agreement did not describe the property as subject to an easement, the fact was of record, and must have been pretty well known to real estate men. Though plaintiff claims ignorance, it is noteworthy that the attorney for plaintiff who examined the abstract refers in his opinion to the easement as being "understood by both parties." But, even if this defect in the title was not known to plaintiff or to Thompson, and it be held that plaintiff is entitled to compensation, there can be no recovery on the pleadings and evidence here, as the value of plaintiff's services is neither alleged nor proved.

Order affirmed.

STATE ex rel. NELSON-SPELLISCY IMPLEMENT  
COMPANY v. DISTRICT COURT OF  
MEEKER COUNTY and Another.<sup>1</sup>

January 15, 1915.

Nos. 19,127—(299).

**Workmen's Compensation Act.**

1. In proceedings for compensation under Part 2 of the Workmen's Compensation Act (chapter 467, Laws 1913), it is *held* that the evidence supports the findings of the trial court to the effect that, at the time of the accident and death complained of, the relation of employer and employee existed between defendant and decedent, that the cause of death was accidental and while decedent was engaged in the course of his employment, and was not caused by decedent's intoxication.

**Act constitutional.**

2. *Held*, further, following *Mathison v. Minneapolis Street Ry. Co.* 126 Minn. 286, that the statute is not obnoxious to the various constitutional provisions invoked by defendant.

**Application to existing contracts of employment.**

3. The statute applies to the relation of employer and employee existing at the time of and which continued after its passage; and does not impair the obligations of the contract by which the relation came into existence.

Upon the relation of Nelson-Spelliscy Implement Co., this court granted its writ of *certiorari* to review an order of the district court for Meeker county, Qvale, J., in an action by Minnie V. Almquist against relator, directing judgment in favor of plaintiff. Affirmed.

*Alva R. Hunt* and *L. K. Sexton*, for relator.

*E. P. Peterson* and *A. F. Foster*, for respondent.

BROWN, C. J.

Plaintiff's intestate, her husband, was on October 27, 1913, acci-

<sup>1</sup> Reported in 150 N. W. 623.

---

Note.—As to the constitutionality of the workmen's compensation acts, see notes in 34 L.R.A.(N.S.) 162 and 37 L.R.A.(N.S.) 466.

dentally killed by the overturning of an automobile which he was driving and on the claim that he was an employee of the Nelson-Spelliscy Implement Co., a corporation, and that the accident and his death arose out of and in the course of his employment, she brought proceedings for the compensation provided for by part 2 of chapter 467, p. 675, Laws 1913, known as the "Workmen's Compensation Act." The matter duly came on for hearing in the district court, where findings of fact were made and judgment ordered for plaintiff in harmony with the provisions of that statute. Thereafter defendant brought the proceeding to this court for review by *certiorari*.

The principal issues of fact on the trial below were: (1) Whether decedent was an employee of the company at the time of the accident; and (2) whether the accident was caused by his voluntary intoxication.

It appears from the record that defendant is a corporation organized under the laws of this state, with its principal place of business at Litchfield, and at the time in question was engaged in buying and selling farm implements, wagons, carriages and automobiles, repairing automobiles and carrying passengers by automobiles for hire. Decedent entered the employ of defendant in July, 1912, and continued therein, according to plaintiff's contention, until the day of his death, which occurred on October 27, 1913. The duties of his employment consisted, among other things, in setting up and repairing automobiles and farm machinery, and operating and driving automobiles in defendant's autolivery business. Defendant contended on the trial that decedent was not in its employ on the day of the accident, and that his term of employment, though previously existing, ended and terminated by decedent's resignation the day preceding his death, and that he was not acting for defendant on the day in question. Also that the accident was caused by the intoxicated condition of decedent. The court found the facts in plaintiff's favor, and to the effect that decedent was at the time of his death in the employ of defendant, acting in the course of his employment, and that the automobile which he was driving was accidentally overturned, and that decedent was not intoxicated.

The assignments of error challenge the findings of the court, its re-

fusal to amend and modify the same, the constitutionality of the statute upon which the proceedings and judgment are founded, and one ruling admitting certain evidence over defendant's objection.

None of the assignments require extended discussion. We find from a reading of the record evidence tending to support the claim of plaintiff to the effect that decedent continued in defendant's employ up to and including the day of the accident, as well as evidence tending to show that his relations with defendant ceased and were terminated prior thereto; we also find evidence tending to show that decedent was at times addicted to the excessive use of intoxicating liquors, that he drank of such liquors on the day in question prior to starting on the particular trip with the automobile, and also during the time thereof, and also evidence that he was not an habitual drinker, and was not intoxicated on this occasion. In this state of the record we are limited in our inquiry to the question whether the evidence, if satisfactory to the trial court, reasonably tends to support the plaintiff's contentions. We hold that it does. The evidence objected to and now complained of disclosed a conversation between decedent and the witness, a person not interested in the action, in which decedent stated that he was to remain in the employ of defendant until the week following the conversation, which would extend his employment beyond the date of the accident. The trial was by the court, and though the evidence was perhaps incompetent, because a self-serving declaration, the admission thereof was clearly not prejudicial. Defendant further contends that, because decedent proceeded to the point of destination over a route which took him beyond that generally traveled between the two points, he exceeded and went beyond and outside the scope of his employment, and assumed all risks encountered while so engaged. There can be no controversy about the general rule invoked, but it has no application to the facts here presented. At the time of the accident decedent was on the return trip to Litchfield, in the usually traveled way, and was then within the scope of his employment. If he had been injured while driving the car beyond the point of destination a different situation would be presented. But his death did not occur at that time.

2. The validity of the statute is challenged on various constitu-

tional grounds, namely, that it deprives the parties of the right to a jury trial; that it deprives the employer of his property without due process of law; that it unlawfully encroaches upon the judiciary; deprives the parties of their right of appeal and, if construed to apply to contract relations existing prior to its passage, that it impairs the obligations of such contracts in violation of both the state and Federal Constitutions.

These questions do not require discussion. They were all presented in the case of *Mathison v. Minneapolis Street Ry. Co.* 126 Minn. 286, 148 N. W. 71, and were disposed of adversely to the present contentions. The reasons for our conclusions are clearly and fully stated in that opinion, and need not here be repeated. We are clear that the statute was intended to apply to relations of employer and employee existing at the time of its passage and continuing thereafter, and we so hold. But this does not render it obnoxious to the Constitution, as impairing the obligations of the contract, arising from such relation. As remarked in the *Mathison* case, and held by the courts generally, no person has any vested right to a rule of law or form of procedure, except perhaps when some form of redress permitted by existing law is expressly stipulated for in the contract. Nor does the fact that the statute does not grant the right of appeal affect its constitutionality. *J. T. McMillan Co. v. State Board of Health*, 110 Minn. 145, 124 N. W. 828. The right of review by *certiorari* is open to both parties, by which all rights may be fully protected. In fact this method of reviewing is expressly given by the statute. Section 30.

This covers all questions requiring special mention and results in an affirmance.

Judgment affirmed.

STATE ex rel. GREAT NORTHERN RAILWAY COMPANY  
v. MUNICIPAL COURT OF CITY OF DULUTH and Others.<sup>1</sup>

January 22, 1915.

Nos. 18,940—(170).

**Action against railway company — change of venue.**

Actions in municipal courts are within the purview of G. S. 1913, § 7721, defining the county residence of railroad companies for the purpose of actions against them; and where the venue in such an action is properly laid thereunder the defendant has no right under section 272 to change it to another municipal court in the same county, though the latter is nearer its principal general office in the state and its principal place of business in the county.

Upon the relation of the Great Northern Railway Company the district court for St. Louis county granted an alternative writ of *mandamus* directing the municipal court of the city of Duluth and the judges of that court to proceed with the trial of the action mentioned in the opinion. From an order sustaining the demurrer of respondents to the petition and alternative writ, Fesler, J., relator appealed. Affirmed.

*Baldwin, Baldwin & Holmes*, for appellant.

*A. E. McManus* and *Victor L. Power*, for respondents.

PHILIP E. BROWN, J.

Duluth and Hibbing, in St. Louis county, have municipal courts organized respectively under special and general laws, both having jurisdiction throughout the county to determine actions for injuries to personal property where the damages claimed do not exceed \$500. In November, 1913, one Juntonen commenced an action in the Hibbing municipal court against relator, a domestic corporation, upon a transitory cause of action arising in the county within the jurisdiction of both courts mentioned. In due time relator filed an affidavit

<sup>1</sup> Reported in 150 N. W. 924.

and demanded, under G. S. 1913, § 272, a change of venue to the Duluth municipal court. Later, after the clerk of the Hibbing court had, in compliance with defendant's demand, transmitted the files to the Duluth court and issue had been joined therein, the latter, on plaintiff's demand, defendant objecting, ordered the cause remanded to the former court; whereupon defendant sued an alternative writ of *mandamus* out of the district court, to compel the Duluth court to vacate its order of remand and retain jurisdiction of the action, alleging, among other things, the foregoing as the basis of the writ. A general demurrer to the petition and writ was sustained, and relator appealed.

Respondents concede *mandamus* to be the appropriate remedy if the action was improperly remanded, and we will so assume, and also that the application to change the venue was in due form, and that by the petition and writ it conclusively appeared on the motion to remand that relator's principal and general office and principal place of business was, as stated in its articles of incorporation and in fact, in St. Paul, which is nearer Duluth than Hibbing, and, while relator's line traverses Hibbing, where it maintains an office and agent, its principal office and place of business in St. Louis county is in Duluth, from which it exercised direct and immediate supervision over all its business and affairs transacted in the county.

The sole question for determination, then, is: Had defendant railroad company the legal right to change the venue of the action from the municipal court in which it was originally laid to the other in the same county? Relator contends it had, both under G. S. 1913, § 272 (Laws 1913, p. 114, c. 104, § 138, approved March 25, 1913), and on common law principles. This section reads in part:

"Where, in any county of this state, there are two or more municipal courts having jurisdictions throughout said county, whether they be created or established under chapter five (5), Revised Laws of Minnesota for 1905, or by any other general or special law, the defendant in any civil action begun in any one of said courts may have a change of venue therefrom to the municipal court in said county nearest his place of residence, by" conforming to certain prescribed practice.

The latter claim may be disposed of shortly. The whole question of jurisdiction and venue as to corporations is embraced in the proposition that as corporations are creatures of statutes they may be sued in such place and in such manner as the legislature creating them may designate or determine. 3 Thompson, Corp. § 3015.

Coming then to the contention based on the statute, it must be remembered that one of the prime purposes entering into the creation of municipal courts is to enable suitors to litigate expeditiously comparatively small claims at no great distance from their residences, which, so far as concerns plaintiffs, will often be defeated if relator's contention is sustained. For example, in the present case the courts in question are more than 80 miles apart. Moreover, the business of these courts will centralize, under the theory offered by relator, in some one of them, to the exclusion of the others, so far as concerns litigation against railroads, thus imposing upon the municipality in which it happens to be located unequable expenses. These considerations, of course, are not controlling. Yet they cannot be ignored in determining the legislative intent. For many years our statutes (G. S. 1894, § 5185, R. L. 1905, § 4095) fixed the residence of a public service corporation in any county wherein it has an office, agent or place of business. These sections were amended by Laws 1913, p. 799, c. 552, approved April 26, 1913 (G. S. 1913, § 7721), providing that railroad companies "shall be considered as residing in any county wherein the cause of action shall arise and wherein any part of its lines of railway \* \* \* shall extend, without regard to whether said corporation or company has an office, agent or business place in said county, or not." Actions in municipal courts are within the purview of this statute, which is *in pari materia* with section 272, so that the two must be construed together. In *Schoch v. Winona & St. Peter R. Co.* 55 Minn. 479, 57 N. W. 208, the former was held applicable to actions in justice court, and in *Taylor v. Grand Lodge A. O. U. W. of Minnesota*, 98 Minn. 36, 107 N. W. 545, it was held to fix corporate residence. Relator insists that if section 7721 is relevant, then so also is G. S. 1913, § 183. This claim, however, cannot be sustained; for obviously the latter relates only to district courts.

We hold that relator is not within section 272, and that the case was properly remanded.

Order affirmed.

---

ERNEST V. PADRICK v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>

January 22, 1915.

Nos. 18,949—(171).

**Damages excessive.**

In this, a personal injury action where the evidence shows an injury to the spinal cord which has permanently crippled plaintiff, virtually destroyed all earning capacity, and so paralyzed him that he is unable to attend to his wants without assistance, it is held that, although the injuries are so severe, the verdict of \$35,000 is excessive and should be reduced to \$30,000.

Action in the district court for Ramsey county to recover \$50,000 for personal injuries received while in defendant's employ. The case was tried before Kelly, J., and a jury which returned a verdict of \$35,000 in favor of plaintiff. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Modified.

*M. L. Countryman* and *A. L. Janes*, for appellant.

*Samuel A. Anderson* and *A. F. Storey*, for respondent.

HOLT, J.

Plaintiff, while in the employ of defendant as an express messenger, was injured in a train collision. He was then 33 years old, earning \$65 per month. Fourteen months after the injury a verdict

<sup>1</sup> Reported in 150 N. W. 807.

---

Note.—As to the extent and character of developments following personal injury for which person inflicting the injury is liable, see note in 48 L.R.A. (N.S.) 93.

for \$35,000 damages was rendered. The court refused to reduce or set it aside. Liability is conceded. The appeal presents the single question: Is the verdict excessive?

At the time of the collision plaintiff was lying on the floor of the express car sleeping. Just how the injury was received is not disclosed. When he awoke to consciousness he was paralyzed so that the only member of his body he could move was his right leg, and that only to a very limited extent. His head was cut and contused. Subsequent examinations by physicians indicate that in some manner the spinal column at about the sixth cervical vertebra was injured. The theory of the medical experts seems to be that because of this injury to the vertebra a blood clot formed at that point in the spinal cord, and as the clot was absorbed the paralysis abated to a certain extent. But the opinion of every physician examined is that such a scar or injury resulted to the cord that the functions of the nerves involved are permanently destroyed or impaired; and the unanimous conclusion is that there is no hope for any improvement in plaintiff's present condition, except insofar as it may be ameliorated by his becoming more accustomed to handling himself. Plaintiff's mind and vital organs are not affected. He is well nourished. The motor nerves controlling his left side seem to be almost entirely gone. He can move the fingers slightly, but the thumb not at all. The sensory nerves in that side still carry on their functions. A tap at any part of the left side of the body causes an extensive and distressing muscular quiver or jerking. These spasms in the muscles also occur without any apparent cause and include the muscles of the bowels, according to plaintiff's testimony. In this he is confirmed by the opinion of medical experts. The right arm has now about three-fourths of its normal strength. The doctors think the right leg has its ordinary strength. This plaintiff disputes. However, the sensory nerves on the right side are greatly impaired. There is numbness in the right leg and arm and an inability to distinguish between heat and cold. If an object is placed in the right hand, plaintiff cannot by the sense of touch tell the form or have any idea as to what it might be. With the aid of a cane or a crutch he can now move himself for a distance of four

or five blocks, but is then exhausted. This can only be done by a wriggling process of the body. Poising himself on the right leg he is able, by a twist or a swing of the whole body, to throw the left leg somewhat forward; then the left leg serving as a peg or support, aided by the cane, enables him to advance the right foot for the next step or throw. In the movement there is a quivering and jerking of the left arm and leg and the toe drags on the ground. Plaintiff is unable to dress or undress himself, or attend to his wants alone. He complains of a severe pain and weakness. One whose natural powers and functions are to such a large extent destroyed or impaired, as is the case with plaintiff, no doubt also experiences a detrimental effect in parts of the body not directly affected, thus causing a general weakness and even pain. The record indicates more in detail to what helpless and pitiable condition a young, strong and healthy person has been reduced.

The verdict is very large and we realize that it would not take more than about one-third thereof to compensate for the lost earning capacity, and about an equal amount perhaps, to procure the needed personal attendance. Does the balance more than compensate for plaintiff's sufferings, discomforts, humiliation and deprivation of all those enjoyments and anticipations of life ordinarily experienced by persons in possession of the usual physical powers and capabilities? But one verdict exceeding in amount the one in this case has been sustained in this court. In *McMahon v. Illinois Central R. Co.* 127 Minn. 1, 148 N. W. 446, plaintiff was awarded \$39,000 for the loss of both legs and practically one arm. The appellant there virtually conceded that the verdict was not excessive, unless it was found that a reduction should have been made by the jury for plaintiff's contributory negligence, the action being under the Federal statute. A verdict of \$35,000 was sustained against the contention of its being excessive in *Clay v. Chicago, M. & St. P. Ry. Co.* 104 Minn. 1, 115 N. W. 949, but it must be admitted that the accident to young Clay left him in a much more helpless and pitiable state than plaintiff finds himself in, bad as it is.

A verdict for the same amount was upheld in *St. Louis Southwestern Ry. Co. v. Waits*, 164 S. W. 870 (Tex.) where a young married

woman had both legs cut off, one at the ankle and the other below the knee. The court there observed: "To say that we apply the rule of compensation in allowing recoveries in such cases really falls far short of stating the truth. There can be no adequate compensation for the loss of such members." In *Huggard v. Glucose Sugar Refining Co.* 132 Iowa, 724, 109 N. W. 475, a verdict of nearly \$33,000 for injuries resulting in paralysis from the region of the small of the back down to the toes was held not excessive, but the plaintiff was practically bound to his bed. *Goetzke v. City of Chicago*, 174 Ill. App. 446, was a case where \$25,000 was allowed for injuries from an electric current whereby plaintiff's hands were so burned that he had "practically no use of his right hand and has only the use of the thumb and forefinger of the left."

Among the large verdicts upheld in this court may be cited: *Whitehead v. Wisconsin Central Ry. Co.* 103 Minn. 13, 114 N. W. 254, 467; *Sprague v. Wisconsin Central Ry. Co.* 104 Minn. 58, 116 N. W. 104, for \$30,000 each, and *Jenkins v. Minneapolis & St. Louis R. Co.* 124 Minn. 368, 145 N. W. 40, for \$25,000.

Though the injuries in the cases mentioned were not the same as those in the case at bar, all are nearly alike in the grave and distressing results to the one injured. However, since no money compensation can ever be adequate for permanent personal injuries of such serious character as the ones here involved, it is apparent that courts, or legislatures, must fix some limit, arbitrary though it be, upon the amount of recovery. Otherwise there will be a tendency to paralyze human endeavor, for these deplorable accidents do happen and, if there be no limit to a recovery, few enterprises will be strong enough financially to survive a verdict of a jury in personal injury actions of serious consequences. Although we recognize that the trial court is in better position to appreciate the injuries for which damages are awarded than is the appellate court, we feel that this is a case where a substantial reduction should be made in the verdict. As stated above the record shows that plaintiff has the appearance of being well nourished, he is not bedridden, he can move about to a limited extent, his mind is unimpaired, and one doctor was of the opinion that he might be able to do some easy clerical work. Upon a con-

sideration of the whole case we are of the opinion that the verdict should be reduced to \$30,000.

If, within 10 days after remittitur is filed in the court below, plaintiff files his consent to a reduction of the verdict to \$30,000, the order appealed from will stand affirmed. Otherwise a new trial is granted.

---

JENNIE ENGBRETSON v. ALBERT BREMER.<sup>1</sup>

January 22, 1915.

Nos. 18,950—(178).

**Vicious animal — evidence — damages.**

Plaintiff sustained personal injuries from an attack by a cow belonging to defendant. It is *held*:

(1) The evidence was sufficient to justify the jury in finding that the animal was vicious, that defendant had prior knowledge of her character, and that he ought not to have allowed her to run at large in a pasture which with his knowledge and consent was constantly traveled by the children of neighbors and others.

(2) Plaintiff was not a trespasser, and defendant owed her the duty to see that a vicious animal was not allowed to run at large in the pasture.

(3) The evidence justified the jury in finding that plaintiff was not guilty of contributory negligence.

(4) The damages, as reduced, are not excessive.

Action in the district court for Becker county to recover \$10,450 for injuries caused by the attack of a vicious cow. The case was tried before Roeser, J., and a jury which returned a verdict in favor of plaintiff for \$2,250. Defendant's motion for judgment notwith-

<sup>1</sup> Reported in 150 N. W. 897.

---

Note.—Upon the liability for injuries inflicted by domestic animals other than dogs, see note in 2 L.R.A.(N.S.) 1188.

For evidence as to disposition of animal prior to injury, see note in 32 L.R.A.(N.S.) 1159.

standing the verdict was denied, and his motion for a new trial was granted unless plaintiff consented to a reduction of the verdict to \$1,500. From the order denying the motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*Johnston & Dennis*, for appellant.

*J. J. Daly*, for respondent.

BUNN, J.

This action is to recover for injuries received by plaintiff, a young woman, in an attack upon her by a cow belonging to defendant. There was a verdict for plaintiff, and defendant appeals from an order denying his motion in the alternative for judgment notwithstanding the verdict or a new trial.

Defendant insists here that the evidence did not warrant the jury in finding defendant liable; the claims in this regard are: First, that there was no proof that the animal was to the knowledge of defendant of so vicious a disposition as to make it his duty to get rid of or more closely confine her; second, that he did not owe any such duty to plaintiff; third, that plaintiff was guilty of contributory negligence. It is also argued that the damages are excessive.

The facts which the evidence proved or tended to prove are as follows:

Defendant is a farmer owning and occupying a farm of some 140 acres in Becker county. Plaintiff is the daughter of a neighboring farmer whose home is about a mile from that of defendant. Their farms adjoin each other and the public highway leading from the village of Frazee passes both, but, as the houses are set back some distance from the highway, the distance between them is considerably reduced by crossing the fields of plaintiff and defendant. The children of plaintiff and defendant were accustomed to visit back and forth, and to cross these fields instead of taking the highway. A lane led from defendant's dooryard to a field used as a pasture. In this pasture defendant kept his stock, including the cow whose conduct is in question here. There was an ice-house in this pasture from which one Eaton in the summer delivered to his customers ice

which was cut in the winter and stored in the house. This was under an arrangement with defendant. In distributing the ice to his customers Eaton's men reached the ice-house from the highway by driving through defendant's farmyard, and the lane before mentioned, then through a gate leading into the pasture and along a road that leads to the ice-house, which stands unenclosed in the pasture. The men used this road each day. There was some use of the pasture by hunters. There was a more or less well-defined footpath leading across plaintiff's and defendant's fields between the two houses.

On September 3, 1912, plaintiff crossed the fields between her father's house and defendant's on the footpath and road above mentioned, purchased some eggs, and began her return journey by the same route. As she came near the ice-house, using the road made by the iceman, the cow attacked her, knocked her down and caused the injuries complained of.

The evidence bearing on the character of the animal and defendant's knowledge thereof may be summarized as follows: It was raised from a calf by defendant, and owned by him at all times thereafter. Defendant admitted that he was told a year before plaintiff was hurt that the cow was cross and had attacked a man, and that he "thought maybe it was so," and dehorned the animal, but still allowed her to run at large in the pasture. A neighboring farmer testified to two attacks on him by the cow a year before, one of which he escaped by climbing a fence and the other by a counter attack with a club. Another witness was a hunter who was forced to take to the fence to avoid the enraged animal. Another witness testified to having told defendant of the cow's attacking still another man, and to advising him to get rid of her. There was also some testimony of the bad reputation of the animal. We have stated enough of the evidence to show that the questions of the vicious character of the cow, and defendant's knowledge thereof, were for the jury, and the evidence such as not to justify our interference with their verdict. Our experience with vicious members of the bovine family has been largely confined to the male members thereof, but it does not enable us to say that a jury of farmers is wrong

when it decides, on such evidence as this record presents, that the gentler sex may occasionally inherit or develop vicious tendencies. The result in this case may be hard on the defendant, but he was warned in time, as he admits, and plaintiff cannot be deprived of a remedy because of the hardship on defendant.

Plaintiff was clearly not a trespasser. The field used as a pasture was, with defendant's knowledge and consent, traveled daily by the iceman, often by the children of the two families, and more or less by hunters and fishermen. We think it must be held that defendant owed to plaintiff the duty to see that a vicious animal was not allowed to run at large in the pasture.

Plaintiff was not guilty of contributory negligence as a matter of law, nor can we say that the verdict is against the evidence on this point. She did not know the character of this cow, had not met it on her previous trips. It is not negligence *per se* to cross a field where cattle are pastured, unless there is knowledge that among them is an animal which is likely to make an unprovoked attack.

Some claim is made that plaintiff's injuries were aggravated by her failure to have proper care and treatment after the accident and that the damages are excessive. This feature of the case was amply covered in the charge to the jury, as well as by the court's liberal reduction of the verdict rendered. We think that the damages, as reduced by the trial court, are not excessive.

Order affirmed.

---

EDWARD T. FORTIER v. EDWARD T. PARRY and Others.<sup>1</sup>

January 22, 1915.

Nos. 18,952—(181).

**Taxation — notice of redemption.**

A notice to eliminate the right of redemption in a tax proceeding examined and held to accurately state the amount required to redeem.

<sup>1</sup> Reported in 150 N. W. 803.

Action in the district court for Hennepin county to determine adverse claims to a vacant city lot. The case was tried before Leary, J., who made findings that defendant was the owner of the land subject to the lien of plaintiff for \$7.97 and ordered that the land be sold to satisfy the lien. From an order denying plaintiff's motion for a new trial and for the amendment of the findings of fact and conclusions of law, he appealed. Reversed.

*A. X. Schall, Jr.*, for appellant.

*Edwin S. Slater*, for respondent.

HOLT, J.

Action to determine adverse claims to a city lot. Defendant is the owner, unless his title has been divested by a tax proceeding under which plaintiff claims. And the only matter urged against the tax title is, the notice of the expiration of the right of redemption is illegal, in that it failed to state accurately the amount required to redeem and also in that the numbering of the notice issued by the auditor is not correct.

Pursuant to a real estate tax judgment entered April 23, 1910, to enforce taxes delinquent for the year 1908, the lot was on May 13, 1910, bid in for the state, and afterwards on October 3, 1912, duly assigned to plaintiff for \$6.61. The notice mentioned, after reciting these facts, continues thus: "And thereafter the purchaser of said state assignment paid upon said land the taxes thereon for the years 1911 [sic] respectively, after said taxes had become delinquent.

"That the certificate of sale, or state assignment so called, has been presented to me by the holder thereof for the purpose of having notice of expiration of time for redemption from said tax sale of said property, given and served; and that the amount required to redeem said piece or parcel of land from said sale at the date of this notice, exclusive of the costs to accrue upon said notice, is the sum of Ten Dollars and ninety-five cents (\$10.95), and interest on Ten Dollars and thirty-four cents (\$10.34) at the rate of 12 per cent per annum from the date of this notice to the date such redemption is made. That the time for the redemption of said piece or parcel of

land, from said tax sale, will expire sixty (60) days after the service of this notice and the filing of proof of such service in my office."

Section 2148, G. S. 1913, requires the notice to specify a description of the lands, "the amount for which the same were sold, the amount required to redeem the same, exclusive of the costs to accrue upon such notice, and the time when the redemption period will expire." In a case such as this where the land has been bid in by the state and afterwards assigned the notice should state the amount paid upon the assignment and not the amount for which the land was bid in by the state. *Sperry v. Goodwin*, 44 Minn. 207, 209, 46 N. W. 328; *McNamara v. Fink*, 71 Minn. 66, 73 N. W. 649. The notice is not required to state the amount paid by the assignee for subsequent delinquent taxes, although these must be included in the amount specified as required to make the redemption. The respondent does not contend, as we understand it, that the notice is defective in respect to any statutory requirement except in the specification of the amount required to redeem. Here he insists that it is fatally deficient. Because of the payment in January, 1913, of the 1911 delinquent taxes, the notice could not be in the exact form prescribed in section 2148, G. S. 1913. However, we venture to say that no one could fail to understand that if redemption was made on the day the notice is dated the exact sum required would be \$10.95, exclusive of the costs to accrue on the notice, and if made any time thereafter interest from the date of the notice at 12 per cent upon the sum of \$10.34 must be added to \$10.95. We fail to discover any uncertainty in the amount or anything to mislead. The sums, dates and interest are all so clearly given that if, at any time after the date of the notice, redemption is made a simple and correct calculation will give the exact amount required.

The form seems to conform to that suggested in *Midland Co. v. Eby*, 89 Minn. 27, 93 N. W. 707, and is apparently sanctioned in *Slocum v. McLaren*, 106 Minn. 386, 119 N. W. 406, in cases such as this where, after assignment from the state, the assignee has paid delinquent taxes before giving the notice. The record discloses that the \$10.34 upon which interest is to be computed is made up of \$6.61,

paid the state at the time of the assignment, and \$3.73, the 1911 delinquent taxes paid afterwards. No claim is made that the amount specified in the notice, as the amount required to redeem at the date thereof, is not correct. The interest to be added thereto, if redemption is subsequently made, is also readily ascertained from the correct data specified. It is true that this court requires the utmost accuracy in the notice of the expiration of the owner's right to redeem his property from tax sale. And if such notice demands more than the statute exacts, for example interest upon interest, the notice will be held void, although the error be trifling in amount in the particular case. *Shine v. Olson*, 110 Minn. 44, 124 N. W. 452, 19 Ann. Cas. 962, is an instance wherein a wrong basis of computation was adopted, resulting in figuring interest from the time of the sale until the date of the notice, adding that to the amount of the sale, and then stating that the sum so obtained would draw interest from the date of the notice until redemption was made. It was an attempt to compound interest, was wrong in principle, and invalidated the notice, although, in that particular case, the difference between the right and the wrong specification would have amounted to less than ten cents had the redemption been made on the last day of the 60-day period allowed by the law. In the case at bar the basis of computation as to rate of interest, time and amount of principal is correct. We are unable to find any valid reason for saying that the notice in question fails to properly and correctly specify the amount required to redeem.

It is further urged that the auditor designated by a serial number B 1071 this tax proceeding, but that the original notice issued herein was numbered B 1061, while as published it was designated by the correct number. The point has no merit. Notices are not required to be numbered. It is done by the auditor for his own convenience. In the absence of proof of prejudice to an interested party, unnecessary matters in notices of this kind may be eliminated as surplusage.

Our conclusion upon the notice renders a consideration of the other assignments of error unnecessary, and the result is that the order denying plaintiff's motion for a new trial must be reversed.

THOMAS JOHNSON v. SARTELL BROTHERS COMPANY.<sup>1</sup>

January 22, 1915.

Nos. 18,960—(186).

**Question for jury.**

1. Whether the defendant negligently started its log carriage without giving the proper and usual signals was a question for the jury and was properly submitted.

**Error to submit question.**

2. The evidence did not justify a submission to the jury of the question whether the carriage was run at a high and dangerous rate of speed; and there was error in submitting it.

**Negligence.**

3. The plaintiff was not negligent as a matter of law.

Action in the district court for Stearns county to recover \$16,000 for injuries sustained while in defendant's employ. The case was tried before Roeser, J., and a jury which returned a verdict in favor of plaintiff for \$6,750. Defendant's motion for judgment notwithstanding the verdict was denied and its motion for a new trial was granted unless plaintiff consented to a reduction of the verdict to \$5,000. From the order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed.

*J. D. Sullivan and R. B. Brower, for appellant.*

*James R. Bennett, Jr., and Hall, Tautges & Loeffler, for respondent.*

**DIBELL, C.**

Action by plaintiff to recover damages for personal injuries sustained while in the employ of the defendant in its sawmill. There was a verdict for the plaintiff. The defendant appeals from the order denying its alternative motion for judgment or for a new trial.

<sup>1</sup> Reported in 150 N. W. 784.

The court submitted three questions, substantially these, to the jury: (1) Whether the head sawyer was negligent in starting the log carriage without the giving of certain customary signals; (2) whether the carriage was run at a high and dangerous rate of speed; (3) whether the plaintiff was negligent.

1. The plaintiff on the morning of his injury had oiled the live rolls. The jury could properly find that this was a part of his ordinary duties. His work took him in the track of the log carriage. As he was getting out of the track he was struck by the carriage and sustained severe injuries.

The method of giving signals was substantially this: When the engineer turned on the steam he gave two blasts of the whistle. This meant that he was ready for the day's operation. When the mill was ready to be started the head sawyer answered the engineer with two blasts. Then everyone was supposed to be at his place and the engineer was at liberty to start the machinery. The head sawyer's two blasts were given before the log carriage was moved back and forth preliminary to its actual operation in sawing. The evidence was sufficient to justify the jury in finding that the head sawyer on this occasion negligently started the log carriage before he gave the customary signal and this question was properly submitted to the jury.

2. It was customary to run the carriage back and forth for the purpose of "warming" or "limbering" it up before the day's work commenced. This was what was being done when the plaintiff was injured. We have examined with care the claim that the carriage was run at a high and dangerous rate of speed. We do not think there is evidence sufficiently substantial in support of it. The plaintiff's evidence does not really support such claim. The submission of it was likely to mislead the jury and we think it must be held prejudicial error.

3. Whether the plaintiff was himself negligent was for the jury. If at the time he was in the performance of his required duties, and if he relied upon customary signals from the head sawyer, which were not at the time given, there is left no sound argument that he was as a matter of law negligent. The evidence justifies a finding that the facts were as suggested.

There should not be judgment notwithstanding; but for the reasons stated in paragraph 2 of the opinion there must be a new trial.  
Order reversed.

---

CHARLES WADSWORTH v. RAY WALSH.<sup>1</sup>

January 22, 1915.

Nos. 18,966—(189).

**Promissory note — consideration — insurance policy.**

1. The issuance and delivery of a policy of life insurance is a sufficient consideration for a note previously given for the first premium on such a policy. A clause in such a note giving the "privilege of increasing or decreasing insurance on first payment" gives to the maker an option, and if he desires to avail himself of it the obligation is upon him to so signify. Evidence of a contemporaneous oral agreement that before writing the policy the payee should inquire whether defendant desired to exercise the option, varies the written agreement and is not admissible.

**Same — offer of proof — contradictory pleading.**

2. A general offer of proof must be considered in connection with the pleadings of the party making it. It is no error to reject proof offered by a party where his pleadings admit the facts to be to the contrary. *Held*, an offer by defendant to prove want of consideration for a note was properly rejected, because, under the admissions of the answer, the evidence offered could not properly be received.

Action in the municipal court of St. Paul to recover upon a promissory note. The case was tried before Finehout, J., who made findings and ordered judgment in favor of plaintiff for \$136.45 and interest. Defendant's motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

*Converse & Grannis*, for appellant.

*John A. Pearson*, for respondent.

<sup>1</sup> Reported in 150 N. W. 870.

128 M.—16.

HALLAM, J.

This action is brought to recover on a note, which is in language as follows:

“November 2nd, 1912.

“On Jan. 15, 1913, I agree to pay to Chas. Wadsworth one hundred fifty-six and 55/100 (\$156.55) dollars premium on \$5,000.00 20 pay life insurance, with privilege of increasing or decreasing insurance on first payment.

“Ray Walsh.”

The answer alleged that the note was given pursuant to an agreement made between defendant and plaintiff's agent, Harrop, a life insurance solicitor; that the agreement was partly oral and partly in writing; that defendant signed an application for a \$5,000 policy of life insurance and agreed that he would pay the premium for a \$5,000 policy if he took that amount, but reserved the right to decrease or increase the amount of the policy when the first payment of premium became due, which would be at the time of the delivery of the policy in January, 1913. It then alleges that it was agreed that before writing the policy Harrop was to see defendant and ascertain from him the amount of the policy which he would accept, but that, without doing so, Harrop wrote and sent to defendant a policy for \$5,000, and that defendant refused to accept it and offered to return it. There is no allegation that defendant ever notified any one that he wanted a policy for more or less than \$5,000, nor that he did in fact want a policy of any other amount. An amendment to the answer was later interposed, alleging that the note was without any consideration, and that the consideration, if any there was, has wholly failed.

We may gather from the answer that the writings between these parties consisted of an application for a \$5,000 policy of insurance and the note here sued on, which was for the first premium on a policy of this amount. The issuance and delivery of a policy pursuant to this application furnished a sufficient consideration for the note. *American Ins. Co. v. McWhorter*, 78 Ind. 136; *Union Central Life Ins. Co. v. Taggart*, 55 Minn. 95, 56 N. W. 579, 43 Am. St.

474. We construe the concluding clause of the note as follows: It gave to defendant a privilege or option to increase or decrease the insurance "on first payment" of premium, that is, at the time of maturity of the note. We do not agree with defendant that the language of this option is susceptible of explanation by oral proof. The language is unambiguous. It did not fix the amount of the policy which he might choose to take, but this was not necessary. The meaning is plain. If defendant desired to avail himself of the option given him, the obligation was upon him to so signify. If he did not exercise this option, the note and the application continued to be binding according to their terms. *Topping v. Root*, 5 Cow. (N. Y.) 407; *Eaves & Collins v. Cherokee Iron Co.* 73 Ga. 459. There was no duty imposed upon plaintiff to inquire of defendant whether he desired to exercise his option. This being the meaning necessarily deducible from the language of the option, it was not competent for defendant to prove a contemporaneous oral agreement to vary this construction which the law necessarily implied. *Liljengren F. & L. Co. v. Mead*, 42 Minn. 420, 44 N. W. 306. The allegation of a verbal understanding that Harrop was to see defendant before writing the policy and ascertain from him the amount of the policy which he would accept, accordingly tenders no issue, because proof of such a verbal understanding could not have been received. In fact it seems clear to us that the allegations of the original answer did not set up a defense.

The amendment alleging that the note was without consideration did, however, set up a defense. On the trial defendant's counsel asked him how the option came to be written in the note, for what purpose and for what indebtedness the note was given, and out of what transactions it grew. Objections to these questions were all sustained, and defendant's counsel then made an offer to prove "that this note was given for the payment of the premium upon a policy of life insurance \* \* \* that that policy was never delivered to or accepted by this defendant, and that he never had the insurance, the premium for which is represented by this note." Objection to this offer was sustained, and the ruling is assigned as error.

If the offer tendered competent and admissible evidence which

would have proven the defense of want of consideration for the note, objection to it was improperly sustained. The offer ostensibly tendered such proof. But the offer must be considered in connection with the answer of defendant.

Defendant could not submit proof which contradicted the plain allegations of the answer. He could not be permitted to prove that the \$5,000 policy, for which the note was given, was not delivered, for the answer in terms alleges that the policy was delivered. Defendant's answer expressly negatives the essential facts which he offered to prove.

The amendment to the answer was perhaps broad enough to admit proof that defendant exercised the option given him of demanding a policy for a less amount than \$5,000, and that this privilege was denied him. But the offer he made cannot be construed as tendering any such proof. An offer of proof should not be technically construed, but it must fairly advise the court of the proof which the party is prepared to furnish. *Alexander v. Thompson*, 42 Minn. 498, 499, 44 N. W. 534. The offer to prove that the note was given for a premium upon a policy of insurance, that the policy was never delivered to or accepted by the defendant, and that he never had the insurance represented by the note, surely does not advise the court that defendant proposed to prove that he exercised an option to take a policy different from that represented by the note and that such a policy was not delivered to him. Nor do we understand defendant to make any claim that he desired to furnish proof of any such state of facts or that such state of facts existed. The only claim made in this court, is that defendant desired to make proof of the state of facts specifically set forth in the original answer, and this state of facts, as we have seen, constitutes no defense to the note. If the offer was broad enough to tender such proof, the proof was not proper. The objection to the offer of proof was properly sustained.

Judgment affirmed.

# HOGAN GRASETH v. NORTHWESTERN KNITTING COMPANY.<sup>1</sup>

January 22, 1915.

Nos. 18,978—(180).

## Expert witness — discretion of court.

1. Trial court *held* not to have abused its discretion in the matter of qualification of witnesses to give expert testimony upon the practicability of fitting a mangle with hand guards.

## Guarding dangerous machinery — failure to warn servant.

2. Evidence in an action to recover damages for personal injuries received while operating a mangle in defendant's factory, *held* sufficient to take the case to the jury on the issues of defendant's negligence in not providing the machine with a hand guard and in failing to instruct and warn.

## Questions for jury.

3. The issues of assumption of risk and contributory negligence were also for the jury.

## Denial of new trial — argument of counsel.

4. Trial court's refusal to grant defendant a new trial on account of remarks made by plaintiff's counsel during argument of his motion for an adjournment in order to enable him to procure expert testimony upon the practicability of guarding the machine, *held* not reversible error; the jury having been promptly directed not to consider the remarks, ample opportunity having thereafter been afforded for inspection of the machine, and the experts making the same having been allowed to testify in the case.

## Charge to jury.

5. There was no reversible error either in the instructions given or in refusal of those demanded.

## Verdict not excessive.

6. Verdict for \$12,000, for injuries to a 17 year old girl's right hand and forearm which not only disfigured but rendered them practically useless, sustained.

<sup>1</sup> Reported in 150 N. W. 804.

Action in the district court for Hennepin county by the father of Edith Graseth, a minor, to recover \$25,000 for injuries sustained by her while operating a mangle in defendant's factory. The case was tried before Hale, J., who at the close of the evidence denied defendant's motion to dismiss the action, and a jury which returned a verdict for \$12,000. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*P. J. McLaughlin*, for appellant.

*Larrabee & Davies*, for respondent.

PHILIP E. BROWN, J.

Action to recover damages for personal injuries. After verdict for plaintiff and denial of defendant's alternative motion, it appealed.

Plaintiff's minor daughter Edith, aged 17 years, was injured in defendant's factory while operating a mangle used for dry pressing new underwear. It contained a polished metal steam-heated roller five feet long and 25 inches in diameter, which made 12 revolutions a minute; the garment being pressed against it by an apron moving in the same direction therewith, the top of the roller, however, being exposed for the purpose of feeding. While Edith, in the performance of her duties, was feeding the machine her right hand became entangled in a garment, was drawn between the apron and the roller, and burned. The charges of negligence relied upon were insufficient guards and failure to warn or instruct, both of which were submitted, but only a general verdict rendered. Defendant insists that neither was established. If, therefore, there was reversible error in the submission of either, or the verdict on either is not justified, at least a new trial must be granted. *Le Mere v. Railway Transfer Co.* 125 Minn. 159, 161, 145 N. W. 1068.

1. First, then, as to the alleged failure to guard: The machine was exhibited in court, and several witnesses gave expert testimony to the practicability of better guarding it. Defendant's claims of error in this regard are: The witnesses so testifying were not qualified. And even if they were, the proofs do not justify a finding for

plaintiff on this issue; negligence, however, being otherwise conceded. Neither is sustainable. The competency of plaintiff's expert witnesses was addressed to the sound discretion of the trial judge. *McDonough v. Cameron*, 116 Minn. 480, 483, 134 N. W. 118. While none of them were familiar with the particular mangle involved, all were either experienced in mechanics or sufficiently conversant with mangles generally to qualify them. With their testimony in, the proofs are sufficient to sustain a finding on the issue, notwithstanding defendant's evidence to the contrary.

2. On the issue of failure to instruct it appeared that Edith had, for upward of nine months before beginning to tend the mangle, been engaged within a few feet thereof, had often seen it in operation, and knew how the work was done. For about a month prior to her injury she worked on the taking-off side of the machine, removing the pressed garments. In doing this she stood on the opposite side from the operator who placed the garments on the roller, and could see and understand the method of handling them. For half an hour, or less, each day during this month, she operated the machine alone, in the absence of the regular feeder, at which times she would have to go to the feeding side to put the garments on the roller, and it was while feeding that she was injured. Except as stated, she was inexperienced. The first time she fed the machine she observed its small rollers on the other side which revolved the apron, and knew that the large roller was steam-heated hotter than an ordinary smoothing iron, and would burn her hand if drawn against it. She also knew the revolving apron pressed the garments against the heated roller sufficiently to pull them around it and take out the wrinkles, and when the apron came into contact with them they were pulled away from her hands, at which time it was necessary to hold them back and straighten them out so as to prevent wrinkling before they passed between the apron and the hot roller. She had also read a notice near the machine stating: "Operators are warned against carelessness. All straightening must be done by the operator feeding the machine." She testified she thought this meant the feeder should be careful not to put her hand on the

roller because it would be burned. Concededly no other instructions or warnings were given.

Defendant, while admitting the general duty of a master to warn, insists that Edith's experience with and knowledge of the machine, its work and dangers were such, and the latter so obvious, that in the exercise of ordinary care and observation she must be deemed to have both known and appreciated them, and hence no instructions or warnings were necessary, under the rule of *Truntle v. North Star Woolen-Mill Co.* 57 Minn. 52, 58 N. W. 832, where it is said at page 58:

"No duty rests upon a master to notify even a minor of the ordinary risks and dangers of his occupation which the latter actually knows and appreciates, or which are so open and apparent that one of his age and capacity would, under like circumstances, by the exercise of ordinary care, know and appreciate."

And *Blom v. Yellowstone Park Assn.* 86 Minn. 237, 90 N. W. 397, and *Jensen v. Regan*, 92 Minn. 323, 99 N. W. 1126, are cited as conclusive, by analogy of facts, of the correctness of this position.

But Edith testified further that the apron and heated roller seemed to her to be so separated as to involve no danger of her hand being caught; that she thought they came tight together only on the under side of the roller; and that, while she had heard of mangle hand guards, she had never seen one and did not know where they were put on or how they worked. "The master's duty is not merely to advise the servant of existing conditions, but to see to it that he comprehends the risk and understands the danger." *Gillespie v. Great Northern Ry. Co.* 124 Minn. 1, 6, 144 N. W. 466. Giving due weight to the girl's age, sex, intelligence and experience, it cannot be held as a matter of law to appear conclusively that she knew or must be deemed to have known that her hand was liable to be drawn into the comparatively wide-appearing pocket made by the apron and the hot roller and injured, because she saw garments pass on the roller, or that she knew or should have known and appreciated the risks and dangers of the service so as to absolve defendant from its duty to warn and instruct. The case is distinguishable from the *Blom* and *Jensen* cases. In the former plaintiff was a

woman 28 years old, had been working at the machine two weeks when injured, but for five weeks previously had operated a similar mangle, except that the latter was provided with a hand guard while the former was not, and the rollers between which her hand was drawn were immediately in front of her so that she could plainly see their operation; wherefore it was held that she assumed the risk, particular stress being laid upon the fact that she was familiar with the use and necessity of a guard. In the Jensen case plaintiff was 19 years old, had operated a mangle of a different type for 11 months before going to work on the one causing her injury, which occurred while she was attempting to extract from the machine, without stopping it, a tablecloth which had become entangled therein, though she could, by using an appliance with which she was thoroughly familiar, have stopped the machine and performed the operation in a perfectly safe manner. "We are clearly of the opinion," said the court, "that respondent had been instructed in the use of the mangle, was thoroughly familiar with it, knew the movements of the rollers and how to start and stop the machine, thoroughly comprehended the danger of permitting her hand to come in contact with the steam-heated roller, had knowledge of the fact that this machine was not equipped with strings to prevent material from wrapping about the rollers, and must have appreciated the danger of attempting to remove the tablecloth without stopping the machine." In neither case was the mangle similar to the one here involved.

3. What has been said disposes also of the claim of assumption of risk being a bar to recovery, adversely to defendant's contention. In 1 Street's Foundations, 166, it is said that before this defense can be invoked it must appear "that the plaintiff knew and appreciated the full extent of the danger to which he was subjected;" which is in accord with the holdings of this court. 2 Dunnell, Minn. Dig. § 5970.

The question of Edith's contributory negligence was likewise for the jury. It is true that within easy access of her left hand there was a crank arm with which, to her knowledge, she could have stopped the machine, or at least slowed it down before her hand was

drawn between the apron and the hot roller; but, in the emergency of the moment she cannot be conclusively charged with contributory negligence because she failed to use the appliance.

4. In the course of argument upon an application by plaintiff for an adjournment in order to enable him to procure expert witnesses upon the practicability of a hand guard on the machine, his counsel stated that until a week before the trial he had been denied the privilege of examining it, and thereafter requested permission for inspection by a mechanic. To this defendant's counsel objected.

"I don't believe that is a proper statement. There is no way of controverting any such statement as that."

The court: "I hardly think that is proper in the presence of the jury."

To this plaintiff's counsel replied that there was a way "of controverting it if it is not true;" which was denied by defendant's counsel. Whereupon the former, on being told by the court to state what he wanted, repeated his request for adjournment and reiterated his statement that the privilege of having the machine examined by experts had been denied; and, upon objection again being made to his remarks, stated:

"Well, if it is untrue, it is prejudicial, if it is true, it is not prejudicial," and on further objection:

"I might say as an officer of this court, that the privilege of having this machine examined has not been accorded to us. If that is prejudicial error I am willing to be criticised and to take the consequence."

This was also objected to, and the court ended the matter with:

"Well, I will instruct the jury that that is not evidence in this case at all, and not to take any stock in it. Just dismiss it from your minds and try this case on the evidence in court."

Defendant assigns this incident of the trial as error. It seems, however, that the remarks complained of were addressed directly to the court, and intended primarily to convince it of the justice of plaintiff's request for an adjournment. At least nothing to the contrary appears. The matter was not specifically adverted to in the charge; but after the succinct and positive direction at the time,

such would hardly seem necessary, especially as full and ample opportunity was thereafter afforded for the examination demanded, and several experts did in fact make an inspection and testify. Moreover, no request to charge was made in this connection, and the trial court has declined to hold the matter ground for a new trial. We are not persuaded that it abused its discretion either in this or upon the point made by defendant's seventh assignment. See 2 Dunnell, Minn. Dig. § 7102.

5. No reversible error appears either in the instructions given or in the refusal of those demanded.

6. The verdict was for \$12,000, which defendant claims is so excessive as to indicate it was given under the influence of passion or prejudice. As a result of the accident the girl's right hand and forearm were burned so severely that skin grafting was resorted to before the wounds healed, the skin being taken from her leg; and she also suffered loss of the ends of her fingers by amputation. The condition in which the hand and arm were finally left is that their anterior surface is practically nothing more than a scar, the tendons are contracted, and the fingers drawn. In short, the hand and forearm are practically useless and are likewise frightfully disfigured. We cannot disturb the verdict.

Order affirmed.

---

GEORGE G. WORTZ v. JOHN R. WORTZ and Others.<sup>1</sup>

January 22, 1915.

Nos. 19,015—(58).

**Deposit of deed — right to recall.**

1. A deed deposited with a third party for delivery to the grantee after

<sup>1</sup> Reported in 150 N. W. 809.

---

**Note.**—Upon the question whether the delivery of a deed to a third person, or record by the grantor, is a delivery to the grantee, see notes in 54 L.R.A. 865; 9 L.R.A.(N.S.) 224, and 38 L.R.A.(N.S.) 941.

the death of the grantor, but which the grantor reserves the right to recall at any time, conveys no title because no valid delivery has been made. *Dickson v. Miller*, 124 Minn. 346, followed and applied.

**Undue influence.**

2. The evidence is sufficient to sustain the finding that a certain deed was procured by undue influence.

Action in the district court for Meeker county to quiet title to certain land and to set aside the deed described in the complaint. By stipulation of the parties the matter was heard before a referee, who made findings and ordered that the deed dated March 4, 1913, be set aside, and that the deed of Elizabeth Wortz to plaintiff dated October 26, 1907, was a valid deed. Defendants' motion to amend the findings was granted in part and denied in part. From the judgment entered pursuant to the order for judgment, defendants appealed. Reversed, except as to the cancellation of the deed of March 4, 1913.

*N. D. & C. H. March and Alva R. Hunt*, for appellants.

*Luke K. Sexton*, for respondent.

**TAYLOR, C.**

The parties to this action are the children of Elizabeth Wortz, deceased. She owned an 80-acre farm in Meeker county and resided thereon until her death on March 12, 1913. After the death of her husband some 17 years ago, plaintiff, her oldest son, took charge of and carried on the farming operations under an arrangement whereby she received one-third of the crops and plaintiff two-thirds thereof. The other children left the farm and established homes for themselves. In 1907, Mrs. Wortz and plaintiff went to a notary public, where she made a warranty deed to plaintiff for the farm, and plaintiff executed a contract to take care of her during her lifetime, and to do certain other things therein specified, and which further provided that the deed should be null and void if he failed to faithfully perform his undertakings. After the papers were executed, Mrs. Wortz directed the notary to keep both the deed and the contract. The instructions which she gave are stated by the

notary as follows: "She said I should keep those papers; if she was not well treated, or at any time wanted those papers, she would come to me personally and get them; otherwise, I was to keep them and after her death I was to deliver them to George." That these were the instructions under which the notary held the deed is undisputed and is found as a fact. After the execution of these papers, Mrs. Wortz and plaintiff and his wife lived together as one family the same as before, and plaintiff carried on the farm and made the division of the crops the same as before. When Mrs. Wortz became dangerously ill her other children were notified, and her daughters came and remained at the house and took care of her until her death. They apparently sought to exclude plaintiff and his wife from their mother's presence, and the relations between some of them and plaintiff and his wife became strained and unpleasant. On February 28, Mrs. Magner, one of the daughters, procured an order from her mother on the notary for the papers and attempted to obtain them. The notary refused to deliver them to any person other than Mrs. Wortz, but offered to go to the house and deliver them to her. Mrs. Magner declined this offer, as she did not want plaintiff to know that the deed had been recalled. Afterwards she had Mr. March, an attorney, prepare a deed from her mother to all the children in equal shares, and on March 4 had him come to the house for the purpose of having it executed. In the presence of the children including plaintiff and his wife, Mr. March read and explained the deed to Mrs. Wortz, and she then executed it. On the same day, the other children executed to plaintiff a lease of the land for the following farming season, and plaintiff executed a written order directing the notary, who held the deed and contract executed in 1907, to deliver them to Mr. March. The deed executed to plaintiff was not delivered on this order, however. Eight days later Mrs. Wortz died, and four days after her death plaintiff repudiated the entire transaction of March 4, and procured from the notary the deed running to himself and placed it on record. The other deed had been recorded on March 8.

Plaintiff brought this action to have the title to the land quieted in himself and to have the deed executed on March 4, 1913, declared

void on the ground that it was procured by undue influence. The trial court rendered judgment to the effect that the deed to plaintiff executed in 1907 was valid; that he was the owner in fee of the land thereunder; and that the deed executed on March 4, 1913, was void and of no effect, for the reason that it was procured by undue influence. Defendants appealed.

The judgment must be reversed, for the reason that there was no valid delivery of the deed executed to plaintiff and it never took effect. Mrs. Wortz clearly and unequivocally reserved the right to recall the deed at any time. This defeated it. In *Dickson v. Miller*, 124 Minn. 346, 145 N. W. 112, the authorities bearing upon this question were fully considered, and the rule governing the present case is there stated as follows:

"If the right to recall or control the deed is reserved, by the great weight of authority title will not pass by the deed for want of delivery, even though the depository makes delivery after the grantor's death." We follow and apply that rule.

The court determined that the deed executed on March 4, 1913, was of no effect, for the reason that it was procured by undue influence. Under the rules governing this court, when reviewing the findings of the trial court, the evidence is sufficient to sustain such conclusion. The result is that Mrs. Wortz died seized of the land in question, and that it forms a part of her estate to be administered by the probate court. Whether she disposed of the property by will or whether it passed to her heirs at law under the statute is the province of that court to determine. So much of the judgment as cancels the deed executed on March 4, 1913, is affirmed; the remainder of the judgment is reversed.

THOMAS J. PURCELL v. F. C. THORNTON.<sup>1</sup>

January 22, 1915.

Nos. 19,110—(296).

**Mortgage — action to redeem — estoppel.**

Plaintiff executed two mortgages on real property, the latter one being for commissions in securing the former, and containing no power of sale. There was default in both mortgages, and the commission mortgage was attempted to be foreclosed by advertisement. The mortgagee purchased at the sale, and at the end of a year went into possession. He and his grantees remained in peaceable possession for more than five years, paid taxes, made improvements, and paid off and procured to be satisfied the prior mortgage. Defendant purchased the land for a valuable consideration, without actual notice of the invalidity of the foreclosure. Plaintiff at all times knew of the attempted foreclosure, of the facts before stated, and of the defect which rendered the foreclosure invalid, but he remained silent, not asserting any title to or right in the land until he commenced this action to redeem. The property in the meantime had greatly increased in value. It is *held* that plaintiff is estopped by his conduct from asserting title to the land or the right to redeem.

Action in the district court for Swift county to ascertain the amount due to defendant under a certain mortgage and to permit plaintiff to redeem upon payment of the amount. The case was submitted upon stipulated facts to Flaherty, J., who made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendant appealed. Reversed with directions.

*Eric L. Thornton* and *T. R. Kane*, for appellant.

*Ray G. Farrington*, for respondent.

<sup>1</sup> Reported in 150 N. W. 899.

---

Note.—As to actions or suits in which equitable estoppel involving title or interest in real property is available, see note in 49 L.R.A.(N.S.) 775.

BUNN, J.

Plaintiff owned a quarter section of land in Swift county. March 1, 1906, he executed two mortgages on the land, the first to Mary F. Johnson to secure his note for \$2,500, the second to the Iowa Mortgage Loan & Investment Co., to secure his note for \$125, given for the company's commission in securing the loan from Mary F. Johnson; this was subsequent to her mortgage. Default was made in the conditions of both mortgages. April 12, 1907, the loan company instituted proceedings to foreclose the \$125 mortgage by advertisement. This mortgage did not contain a power of sale. The notice, however, stated that the mortgage would be foreclosed by virtue of the power of sale therein contained, and both it and the subsequent proceedings were in strict accord with the statute. The foreclosure sale took place June 1, 1907, and the land was bid in by the mortgagee for \$177.50, the amount due on the mortgage with costs and disbursements. No redemption from this sale was made or attempted, and on June 1, 1908, the purchaser took possession of the land as owner. On the same day it in good faith and for a valuable consideration conveyed the land to the Mason City Loan & Trust Co. April 15, 1911, Mary F. Johnson in good faith and for a valuable consideration assigned the \$2,500 mortgage to S. A. Schneider, who was the secretary of the Mason City Co.; this assignment was taken and held in trust for the company and was recorded a few days after it was given. November 13, 1911, Schneider, believing that the Mason City Co. was the owner in fee of the land, and that he was obliged to satisfy the mortgage to clear the title, and without knowledge of any claim of ownership on the part of plaintiff, satisfied of record the \$2,500 mortgage.

October 24, 1912, the Mason City Co., for a consideration of \$6,576, conveyed the land to defendant. This deed was duly recorded. After the commencement of this action, pursuant to a contract entered into before the action was begun, defendant conveyed the land to one Stammers for \$7,200. At the time of the attempted foreclosure of the \$125 mortgage the land was worth \$3,000, and at the time this action was commenced it was worth \$8,000. From June 1, 1908, until the commencement of this action on April 16,

1913, plaintiff has, without objection, permitted defendant and his grantors to occupy said land, and to enjoy and improve the same. Defendant and his grantors have paid each year the taxes on the premises, aggregating \$329.38. During the fall of 1912 defendant made improvements on the premises of the value of \$1,086. The value of the use and occupation of the premises was \$160 each year. Plaintiff has never paid any part of the \$2,500 mortgage or of the interest thereon.

This action was brought to have defendant declared a mortgagee in possession, and to have it adjudged that plaintiff might redeem from the foreclosure of the \$125 mortgage by payment of the amount found due defendant as assignee of the mortgagee in said mortgage. The facts were stipulated and found by the court substantially as we have above stated them. In addition the court found that plaintiff had done nothing to estop him from redeeming from the \$125 mortgage or the attempted foreclosure thereof. As conclusions of law, the court determined that the foreclosure of the \$125 mortgage was null and void, that plaintiff has a right to redeem from such foreclosure, and that upon the deposit by plaintiff of the sum of \$199.92, being the principal sum of \$125, with interest, plaintiff is entitled to judgment that such mortgage has been paid and the pretended foreclosure redeemed from. It was further determined that defendant has no rights in the premises and no lien or interest therein, and no claim against plaintiff arising out of the \$2,500 mortgage to Mary F. Johnson, or the subsequent payment and satisfaction thereof. It was further determined that defendant is entitled to recover from plaintiff the taxes paid on the premises, and the value of the improvements made thereon, less the sum of \$1,120, the value of the rents and profits of the premises for the years 1908 to 1914 inclusive. Judgment was entered on this decision, and defendant appealed therefrom to this court.

The only contention of defendant that we find it necessary to consider is that plaintiff, on the facts stipulated and found, is estopped from now asserting title to the land or the right to redeem.

The attempted foreclosure was clearly void because the mortgage contained no power of sale, and therefore could be foreclosed only

by action. R. L. 1905, § 4457. *King v. Meighen*, 20 Minn. 237 (264).

The purchaser at the sale in good faith went into possession under the foreclosure, and, though it was void, is regarded as a mortgagee in possession. *Martin v. Fridley*, 23 Minn. 13; *Johnson v. Sandhoff*, 30 Minn. 197, 14 N. W. 889; *Buchanan v. Reid*, 43 Minn. 172, 45 N. W. 11; *Backus v. Burke*, 63 Minn. 272, 65 N. W. 459. Defendant, as the grantee of the mortgagee in possession, occupies the same position. Plaintiff's legal title was not affected by the attempted foreclosure. His right to redeem therefrom continued to exist until the right to foreclose was barred by the statute, unless his title was lost by abandonment, or unless he is estopped from asserting such title. It is the settled rule in this state that a vested title to real estate, though it may pass to another by adverse possession or estoppel, is never lost by abandonment. *Smith v. Glover*, 50 Minn. 58, 52 N. W. 210, 912; *Krueger v. Market*, 124 Minn. 393, 145 N. W. 30, and cases therein cited.

Is plaintiff estopped from now asserting his title or right to redeem? The facts were all stipulated. There is a finding to the effect that plaintiff did nothing and permitted nothing to be done that should estop him from redeeming, and that defendant, in dealing with the land, did not rely on any act or conduct of the plaintiff. This finding is really a conclusion drawn by the court from the facts stipulated. It is true that plaintiff did not by any positive words or acts acquiesce in the foreclosure as valid. His conduct consisted of passiveness, of sitting silently by and permitting the purchaser to take and retain possession, to pay the taxes for six years, to pay off the \$2,500 mortgage, and to make valuable improvements. He made the mortgage which it was attempted to foreclose. He was in default on this and on the prior mortgage. The two mortgages, with interest, aggregated a sum slightly less than the value of the land at that time. It has greatly enhanced in value since, being now worth \$8,000, and plaintiff has been released from all liability to pay any part of the mortgage indebtedness. Is not this a case of estoppel? It is true that the court finds that defendant, in dealing with or purchasing the land, did not rely on any act or conduct of plaintiff. But this finding was

not based upon any evidence, being really as before stated, the conclusion of the court drawn from the facts stipulated. There clearly was reliance on plaintiff's acquiescence in the validity of the foreclosure. Had he asserted its invalidity when possession was taken by the purchaser, had he not permitted defendant and his grantors to remain in peaceable possession, it is impossible to suppose that they would have released him from the \$2,500 mortgage. We think there was enough reliance on defendant's conduct to satisfy this element of the doctrine of estoppel by conduct.

It is argued that because plaintiff's conduct consisted only of silence, and the invalidity of the foreclosure appeared of record, there was no estoppel. The same claim was made in *Dimond v. Mannheim*, 61 Minn. 178, 63 N. W. 495, where the court recognized the general rule that, when the title of a party sufficiently appears of record, mere silence on his part is no violation of duty, and does not estop him from asserting his title as against others dealing with the property as another's, but stated that this rule was subject to certain limitations and qualifications. In the *Dimond* case, there was an invalid foreclosure, and its invalidity appeared of record. Mr. Justice Mitchell points out that the conduct of plaintiff in acquiescing for 20 years in the validity of the foreclosure, abandoning the land to the title supposed to have been acquired under it, and repudiating all the duties of ownership, amounted to more than mere silence in the presence of a claim of adverse and hostile title. He then says: "The mere fact that the records in the register's office furnished the means by which the defendants might have ascertained the defect in the foreclosure proceedings is not of itself sufficient to prevent them from insisting upon an estoppel." The opinion cites *Pomeroy*, Eq. Jur. § 810; *Bigelow*, Estop. 594; *Wetzel v. Minnesota Ry. Tr. Co.* 65 Fed. 23, 12 C. C. A. 490; *Conklin v. Wehrman*, 38 Fed. 874, and *Sumner v. Seaton*, 47 N. J. Eq. 103, 19 Atl. 884, and holds that all the elements of an equitable estoppel may exist, notwithstanding that the records disclose the actual state of the title, even when the conduct of the party estopped consists merely of silence and failure to assert his title. It was held in that case that plaintiff was estopped from asserting the invalidity of the foreclosure. It

is true that the facts in that case make a stronger case than those here, in respect to the length of time that the plaintiff remained silent. But this is not a controlling feature. We have here the same apparent abandonment of the land to the title of the purchaser at the sale, the same repudiation of all the duties of ownership, the same knowledge that other parties were dealing with the property and paying taxes, the same great increase in the value of the land, and in addition the important feature of the payment of the \$2,500 mortgage. If this does not create an estoppel the doctrine is too limited in its scope to be worth much. It is an equitable doctrine, "founded in natural justice, and is a principle of good morals as well as law." *Gregg v. Von Phul*, 1 Wall. 274, 17 L. ed. 536. "So far from being odious, it is a favored doctrine of the courts." *Dimond v. Manheim*, supra. "The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. No one is permitted to keep silent when he should speak and thereby mislead another to his injury. If one has a claim against an estate, and does not disclose it, but stands by and suffers the estate sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterwards to assert his claim against the purchaser. And justly so, because the effect of his silence has actually misled and worked harm to the purchaser." Such was the language of Mr. Justice Davis in *Gregg v. Von Phul*, 1 Wall. 274, 17 L. ed. 536, quoted by Mr. Justice Jaggard in *Macomber v. Kinney*, 114 Minn. 146, 128 N. W. 1001, 130 N. W. 851. It fits this case. The principles which govern a controversy as to when the owner of land estops himself were stated in the case last cited, and have been so often stated in the books that there is no occasion for dispute as to what they are. But as said by Mr. Justice Mitchell in *Dimond v. Manheim*, supra, "the courts have always been cautious, as in the matter of defining fraud, not to give a definition of universal application without modification or limitation, and without reference to the peculiar facts of a particular case." We have here, as it seems to me, a case where plaintiff remained silent when it was his duty to speak. He knew he was in default, knew the mortgagee was

attempting to foreclose, knew the defect that rendered the foreclosure invalid. He may not have maintained silence with any fraudulent intent, but this is not necessary. He must have known that it was both natural and probable that his conduct would result in others dealing with the property in reliance on the validity of the foreclosure. We might cite a mass of authorities with facts more or less like those here, but it is unnecessary. We hold that plaintiff is equitably estopped by his conduct to claim title to the land involved or the right to redeem.

The judgment appealed from is reversed, with directions to the trial court to amend its conclusions of law in accordance with this opinion, and to order judgment for the defendant.

---

LOWELL A. LAMOREAUX and Another v. LOUIS ANDERSCH  
and Others.<sup>1</sup>

January 29, 1915.

Nos. 18,938—(167).

**Mechanic's lien — claim of architect.**

1. An architect who, under contract with the owner of land, furnishes plans and specifications for the construction of a building thereon, is entitled to a lien upon the building and land upon which it is constructed, though he does not supervise the construction.

**Same.**

1a. If the owner, after the plans are furnished, of his own volition and without fault of the architect abandons the construction of a building on the land, the architect has a lien on the land. An actual improvement is not necessary to a lien.

**Same — filing lien statement.**

2. The contract between the architect and the owner was that the former

<sup>1</sup> Reported in 150 N. W. 908.

---

Note.—Upon the right to a mechanics' lien for services of architect, generally, see notes in 16 L.R.A. 600 and 36 L.R.A.(N.S.) 354.

should furnish plans and specifications for and supervise the construction of the building for an entire consideration based on a percentage of the total cost. The lien statement was filed within 90 days after the owner repudiated the contract. It is *held* that such statement was filed in time, though the last work on the plans and specifications was done more than 90 days prior thereto.

Action in the district court for Hennepin county to foreclose a mechanic's lien. The case was tried before Fish, J., who made findings and ordered judgment in favor of plaintiffs for \$1,800. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

*Lancaster, Simpson & Purdy* and *James E. Dorsey*, for appellants.  
*Lind, Ueland & Jerome*, for respondents.

BUNN, J.

This is an action to foreclose a mechanic's lien. There was a trial before the court without a jury and a decision for plaintiffs. Defendants appeal from the judgment entered on the decision.

The facts are as follows: Plaintiffs are architects. In September, 1912, defendants Louis and Julius Andersch and Charles Andersch, since deceased, entered into a contract with plaintiffs by the terms of which plaintiffs agreed to make plans, with details and specifications, for a building to be erected on two lots in Minneapolis owned by defendants, and to superintend the construction of the building. Plaintiffs were to receive as compensation for their services a sum equal to four per cent of the cost of the building. The plans and specifications were prepared, submitted to contractors for bids, and delivered, with the bids received, to defendants in November, 1912. Prior to this time defendants had a survey of the land made and furnished to plaintiffs for their use in preparing the plans, and tore down an old barn that was standing on the lots. The plans and specifications were retained by defendants without objection, but they did not accept or reject the bids, or take any action in the matter until May 27, 1913, when they repudiated the contract with plaintiffs, and abandoned the project of constructing a building on the lots. Prior to this time nothing was done either towards the con-

struction of the building or to discharge plaintiffs as architects or release them from their obligation to perform their contract.

After the bids were received plaintiffs prepared details. The last work on these was done March 27, 1913. On May 23, 1913, one of the plaintiffs devoted some time to an examination of the details, which had been drawn by an employee, to ascertain whether they had been properly prepared. The lien statement was filed August 18, 1913.

The questions argued by counsel are these: (1) Are plaintiffs entitled to a lien notwithstanding there was no improvement on the land? (2) Was the lien statement filed in time? (3) In case it be held there is no lien, was it error to refuse defendants' demand for a jury trial on the issue of their liability for breach of contract?

1. The first question is one of doubt and difficulty, and the conclusion reached is not the unanimous opinion of the court. It appears conclusively, we think, that there was no improvement on the land. The removal of the old barn by defendants and the making of the survey cannot be considered as an improvement. This was done entirely independently of the contract with plaintiffs, and clearly plaintiffs contributed nothing to this work. Architects are entitled to liens for services in preparing plans and superintending construction where there is an actual improvement to which their work contributes. *Knight v. Norris*, 13 Minn. 438 (473); *Gardner v. Leck*, 52 Minn. 522, 54 N. W. 746; *Wentworth v. Tubbs*, 53 Minn. 388, 55 N. W. 543; *Wanganstein v. Jones*, 61 Minn. 262, 63 N. W. 717. In each of the cases cited, there was an actual improvement, and in each the architect not only made the plans, but supervised the construction. It has been held that an architect's services in preparing plans only are not lienable, but we confess our inability to see why plans and specifications do not as much contribute to the construction of a building as does the supervision by the architect, and well considered cases so hold. *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685, 79 N. W. 616; *Parsons v. Brown*, 97 Iowa, 699, 66 N. W. 880; *Fitzgerald v. Walsh*, 107 Wis. 92, 82 N. W. 717, 81 Am. St. 824; *Freeman v. Rinaker*, 185 Ill. 172, 56 N. E. 1055; *Ehlers v. Wannack Bros.* 118 Cal. 310, 50 Pac. 433; *Field v. Consolidated Mineral*

Water Co. 25 R. I. 319, 55 Atl. 757, 105 Am. St. 895. We think plaintiffs would have been entitled to a lien if their plans had been used in the construction of a building on the premises.

Is this right to a lien lost when the owner, through no fault of the architect, does not use the plans or make the contemplated improvement? Liberal construction of the lien statute is the settled policy in this state. But the right to a lien in any case is still wholly dependent upon the language of the statute. There is no lien except where the statute gives one. The answer to the question therefore depends upon the words of the statute, liberally construed to further the objects of its enactment.

G. S. 1913, § 7020, the first section in the chapter relating to liens for labor and material, and the one giving the lien, provides in substance that:

Whoever contributes to the improvement of real estate by performing labor, or furnishing skill, for the erection of a building thereon, shall have a lien *upon such improvement, and upon the land on which it is situated*, for the price or value of such contribution.

By section 7021, a lien extends to the interest of the owner in "the premises improved." By section 7022, a person contributing labor, skill, materials or machinery for the construction, or alteration or repair of railway lines, etc., is given a lien upon "the line so improved." Section 7023, providing when a lien shall attach, says that, as against the owner, it shall take effect "from the time the first item of material or labor is furnished upon the premises for the beginning of the *improvement*;" that as against a *bona fide* purchaser, mortgagee or incumbrancer, no lien shall attach "prior to the actual and visible beginning of the *improvement on the ground*," except when a contractor files in the proper office a brief statement of the nature of his contract, such statement is notice of his lien for the contract price or value "of all contributions to such *improvement* thereafter made by him." Section 7024 speaks of liens attaching "by reason of such *improvements*," of liens for *improvements*, and provides for a notice to be served by an owner upon persons doing work or "otherwise contributing to such *improvement*," when improvements are made upon his land without his authority. Section

7026 requires the lien statement to be filed in the county "in which the *improved premises* are situated," and provides that it shall set forth, among other things, "for what *improvement*" the labor, etc., was done or supplied. Section 7027 provides that a lienholder who has *contributed to the erection*, etc., of two or more buildings or improvements situated upon one lot or upon adjoining lots, under one contract with the owner, may file one statement for his entire claim, embracing the entire area "*so improved*," or may apportion his demand between the several "*improvements*," and assert a lien for a proportionate part upon each, and upon the ground appurtenant to each. Section 7028 requires an action to enforce the lien to be brought in the county in which the "*improved premises*" are situated. By section 7029, the summons is required to contain a brief description "of the *improvement* out of which the lien arose."

It must be conceded that the lien statute, if construed literally, does not expressly give a lien when no improvement is begun on the ground. Can we, by liberality of construction, nevertheless say that a lien may attach under such circumstances? To answer this question correctly, a review of our past decisions is necessary. We have no case where a lien has been granted when there was no tangible improvement on the ground. In *Smith v. Barnes*, 38 Minn. 240, 36 N. W. 346, the lien claimant supplied material for a building to be erected on lot 5. This material was diverted to lot 6, and no building was constructed on lot 5. It was held that, as against a mortgagee, a lien could not be enforced against lot 5. The court said that the statute "seems to contemplate that there must be or have been a building situated upon the land against which the decree is demanded." In *Burns v. Sewell*, 48 Minn. 425, 51 N. W. 224, lumber was furnished on the ground, but not used in the building. A lien was allowed, and the case distinguished from *Smith v. Barnes*, in that there was no building in that case. There are a number of cases in this state where liens have been allowed for material furnished for but not used in the construction, but in each case there was an actual improvement. *Howes v. Reliance Wire-Works Co.* 46 Minn. 44, 48 N. W. 448; *Hickey v. Collom*, 47 Minn. 565, 50 N. W. 918; *Burns v. Sewall*, supra; *Combination Steel & Iron Co. v. St. Paul City Ry. Co.* 52

Minn. 203, 53 N. W. 1144; John Paul Lumber Co. v. Hormel, 61 Minn. 303, 63 N. W. 718; Berger v. Turnblad, 98 Minn. 163, 107 N. W. 543; Thompson-McDonald Lumber Co. v. Morawetz, 127 Minn. 277, 149 N. W. 300. In the last case, it was decided that an actual delivery upon the premises of material sold to a contractor for use in the construction of a building was not necessary to a right to a lien, but that a good faith delivery of the material to the contractor is sufficient. This is an exception to the general rule that to entitle a mechanic or materialman to a lien for work performed or materials furnished at the request of the contractor, the work must be done or the material delivered on the premises upon which the building is being erected, as are the cases of Howes v. Reliance Wire-Works Co. and Berger v. Turnblad, in which the material required was specially prepared for the building at the shop of the contractor with the consent of the owner, but was not in fact delivered on the premises, the delivery being prevented by the owner. Logically it is perhaps a stretch to say that one "contributes to the improvement of real estate" whose labor or material does not go into the improvement or enhance the value of the real estate. It should also be noted that the lien statute read "whoever performs labor or furnishes skill or material for the erection" of a building, instead of as it does now, at the time the cases above cited except the Thompson-McDonald case, were decided. But the last case is ample authority for holding that the change in the language of the statute does not change the settled rule in this state that actual use in the building or actual delivery to the premises is not essential to a lien. If, in the case at bar, the building had been actually constructed or its construction begun, on the plans furnished therefor by plaintiffs, their right to lien would be clear. The owner could not defeat the lien by abandoning the project after the improvement was actually begun on the ground, nor would the destruction by fire of a partially completed building destroy the lien.

Nothing can be added to what has been said in our past decisions of our policy as to the construction of lien laws. Emery v. Hertig, 60 Minn. 54, 57, 61 N. W. 830; Johnson v. Starrett, 127 Minn. 138, 149 N. W. 6. While it is perhaps difficult to see how the value of

property is enhanced in any case by labor or material that does not go into the improvement, or how such labor or material "contributes to the improvement," our liberal policy has led to this result where there is an actual improvement. Is it an unwarranted extension of this doctrine to include cases where no improvement is made, when that is no fault of the laborer or materialman? There is little light on this question in the reported cases. The case of *Smith v. Barnes*, 38 Minn. 240, 36 N. W. 346, would be authority for the position that there must be an improvement on the land, except that the lien in that case was sought to be enforced against a mortgagee, while here the defendants were the contractors. The case of *Foster v. Tierney*, 91 Iowa, 253, 59 N. W. 56, 51 Am. St. 343, is valuable for the reasoning of the opinion, but the Iowa statute reads somewhat differently from ours, and Iowa is classed as a strict construction state. The case does hold, however, that architects are not entitled to a lien for plans and specifications where no improvement is made. In *Freeman v. Rinaker*, 185 Ill. 172, 56 N. E. 1055, the court said that an architect was entitled to a lien for preparing plans and specifications for a building which was not erected, but the case was decided against plaintiff on another point. The Illinois statute specifically gives a lien to one who performs services as an architect *for the purpose* of building a house, etc. These cases are the only ones cited that bear at all directly on the precise point involved here. We place our decision on the language of the lien statute of this state, as it has been construed in the cases referred to, and hold that there may be a lien without an actual "improvement," and that we can fairly say that plaintiffs "constructively" contributed to an improvement of defendants' land in this case.

We must not overlook the fact, as found by the trial court, that defendants prevented the improvement, thus of their own volition and through their breach of contract preventing the work of plaintiffs from actually contributing to the construction of an actual improvement on the land. We do not mean that the breach of contract created the lien. Of course it could not, but it is rather hard on those who have performed labor or furnished material in reliance upon the lien statute if the owner can defeat their liens by refusing

to go on with the building. It is true that the statute, in the various sections above noted, speaks of an "improvement" as an accomplished fact, and in every case that has heretofore come before this court there has been some actual improvement wholly or partly constructed or the construction begun. This would naturally be so in most every case where liens are asserted. Clearly the right to a lien exists when an improvement has actually been begun, be the start no more than the beginning of an excavation. If the owner of land contracts for cut stone or wood work for a building thereon, and the material is prepared in the shops of the contractors and delivered to the premises, should we say that the owner may defeat the right to liens by then abandoning the construction of the proposed building? Though the question is not free from doubt, we have reached the conclusion that the owner cannot in this way destroy the right to a lien. This conclusion is strengthened by the language of section 7023 of the lien statute, providing that "all such liens, as against the owner of the land shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement." The balance of the section providing that as against *bona fide* purchasers and mortgagees without notice, "no lien shall attach prior to the actual and visible beginning of the improvement on the ground," seems to further justify the idea that as against the owner, an actual beginning of the improvement upon the ground is not necessary, providing the first item of labor or material is furnished upon the premises, or specially prepared for the building in the shop of the laborer or materialman, or, as in this case, in the office of the architect.

We therefore hold that plaintiffs had a right of lien on the land of defendants.

2. Was the lien statement filed in time? In deciding this question we will assume that the last work on the plans, specifications and details was done March 27, 1913. If the 90 days runs from this date the lien statement was clearly filed too late. But plaintiffs had no right to file a lien at that time, as they had not completed their contract, which called for supervision of the construction as well as for plans and specifications. It was an entire contract, and, had the

building been constructed, plaintiffs could not have recovered their compensation or filed a lien therefor until the construction was completed, as their contract would not be fully performed until that time. *Bentley v. Adams*, 92 Wis. 386, 66 N. W. 505; *Richardson v. Central Lumber Co.* 112 Ill. App. 160, following *Freeman v. Rinaker*, 185 Ill. 172, 56 N. E. 1055. There can be no doubt that this is correct, and it is claimed therefore that the date of defendants' repudiation of the contract, May 27, is the date from which the statutory 90 days begins to run. But our statute is plain and explicit: "The lien shall cease at the end of ninety days after doing the last of such work, or furnishing the last item of such skill, material, labor or machinery, unless within such period a statement" etc. shall be filed. Section 7026, G. S. 1913. The time for filing the statement does not run from the completion of the building, as it does in many states, but from the doing of the last work or furnishing the last item of skill or material by the lien claimant. Under statutes which do not permit a lien to be filed until the building is completed and which give a stated time thereafter in which it may be filed, it is manifestly logical to hold, as the authorities uniformly do, that the date of abandonment of the work is deemed the date when it is completed. 27 Cyc. 139, and cases cited. Otherwise lien claimants would be out entirely. But under statutes like ours one who does work or furnishes skill or material may file a lien when his work is done or contract performed; he need not wait until the building is completed, unless his contract is not performed until then. And, in such cases, when the work is abandoned or suspended without the fault of the lien claimant, he may immediately file a lien for the work already done or the skill or material already furnished, though he has not fully performed his contract. *Knight v. Norris*, 13 Minn. 438 (473). The present case clearly falls within this rule, and the only matter of doubt is: Within what time after the abandonment of the project by defendants could plaintiffs file their statement? Though in this particular case the 90 days from the date of furnishing the details had not expired when defendants repudiated the contract, there being some 30 days still to run, there might well be cases where the 90 days had already expired when the contract

was repudiated or work of construction abandoned. The manifest injustice in such cases of holding the right to a lien lost is apparent. Clearly plaintiffs had some length of time after May 27 in which to prepare and file their lien statement. We cannot say that it must have been done within the 30 days remaining, for such a rule would be in many cases an impossible one to apply. We must either say that they had a reasonable time thereafter in which to file their lien, or say that they had the full 90 days thereafter. A majority of the court favors the latter view. The case of Voigtmann v. Wilmington Trust Bldg. Corp. 78 Atl. 920 (Del.) is opposed to this conclusion, and the authorities in support of it are not entirely satisfactory, but a definite rule is better than one which leaves the question of what is a "reasonable time" to be litigated in each case.

Deciding as we do that plaintiffs had a lien and that the statement was filed in time, it is plainly unnecessary to determine the other question argued.

Judgment affirmed.

---

WILLIAM QUINN v. ST. PAUL BOILER &  
MANUFACTURING COMPANY.<sup>1</sup>

January 29, 1915.

Nos. 18,948—(174).

**Injury to servant — judgment *non obstante*.**

1. In this a personal injury action by a servant against his master, there is not such an absence of evidence to sustain an alleged failure of the master to discharge one of his absolute duties that defendant is entitled to judgment notwithstanding the verdict.

<sup>1</sup> Reported in 150 N. W. 919.

---

Note.—On the question of the right to judgment *non obstante veredicto* because of failure of proof, see note in 12 L.R.A. (N.S.) 1021.

**Evidence.**

2. There is ample evidence to establish the facts which under the court's instruction warranted a recovery. No error is assigned upon the charge, and, right or wrong, it must be accepted as the law of this case.

**Damages excessive.**

3. The damages awarded are considered excessive.

Action in the district court for Ramsey county to recover \$32,000 for personal injuries received while in defendant's employ. The case was tried before Dickson, J., and a jury which returned a verdict in favor of plaintiff for \$9,850. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed on condition.

*Denegre & McDermott* and *Harry S. Stearns*, for appellant.

*Duxbury, Conzett & Pettijohn*, for respondent.

**HOLT, J.**

Plaintiff while working for defendant was injured. This action followed, the injury being attributed to defendant's negligence. Defendant appeals from the order denying its alternative motion for judgment notwithstanding the verdict or for a new trial.

The defendant is a corporation engaged, among other things, in putting up, taking down and moving metal smokestacks, metal breeching, etc., in factories and large buildings. On Saturday, July 5, 1913, defendant started to move the smokestack and take down the breeching in the boiler room of the Waldorf Box Board Co. in St. Paul. It was to be done in three days. This room is about 50 by 60 feet in dimension. The boilers are in the northwest corner and extend south to within 25 feet of the south wall. The smokestack, about 4½ feet in diameter, of sheet steel, stood at the time within a foot of the south wall and about 25 feet from the southwest corner of the room. The smoke and gases were conducted from the vent of the boilers near the west wall by a huge pipe, variously estimated as 4 feet wide by 5, 7, or 9 feet high, made of sheet steel, riveted together. This pipe, called the breeching, passed from the boilers south along the west wall, but at a distance

of from 2 to 3 feet therefrom, and at a height between the bottom thereof and the floor, of 18 or 20 feet. When within 3 or 4 feet from the south wall, it branched in two directions, each branch being of the same dimensions as before stated. One of these branches turned to the east and ran along the south wall, at a distance therefrom of about 3 or 4 feet, and at the same height from the floor as already stated, until it reached the smokestack which it entered by means of an elbow. The other branch dropped down to the floor and ran along upon the floor, directly beneath the one above, until it reached, and also entered the stack. The part of the stack between where the two branches of breeching entered contained, or was called, the fan. Four or five 16 or 18 inch iron I beams ran across the room from north to south at about the same height as the bottom of the breeching, that is 18 or 20 feet from the floor. These I beams supported a contrivance for heating the water before it entered the boilers. It is spoken of as the economizer. Its shape or dimension is not given but it evidently needed some attention, for the owners of the factory had laid upon the I beams a plank platform, which came within about 12 feet of the south wall, so as to have ready access to the economizer, the top of the boilers, and whatever machinery and appliances were located at that height. The platform was reached from a ladder on the east side of the room.

Defendant's undertaking was to move the smokestack from the south wall and place it against the west wall of the room. This necessitated taking down the stack, and removing the breeching, at least all thereof parallel with the south wall. On the Saturday mentioned, a crew of four or five men under a foreman, accompanied by Oscar W. Olson, an officer and superintendent of defendant, began the work. The foreman and part of the crew worked on the outside, rigging up a gin-pole, an instrumentality necessary in taking down large smokestacks. Olson and the others worked inside. The record is vague as to what particular work was done inside on Saturday. Plaintiff contends that preparation was then made by placing planks as staging for the larger crew which was expected there Sunday. But undoubtedly some rivet cutting upon the breeching took place on Saturday and perhaps part thereof was

then removed. Plaintiff was working for defendant Saturday, but in another part of the city. Sunday morning he, with some other men, was set to work in this boiler room cutting rivets upon the breeching. No scaffold, properly speaking, had been erected on Saturday, and none was erected on Sunday. But it appears that the men got to the breeching from the platform and I beams mentioned, and, when the beams and permanent structures did not furnish the needed place whereon to work, planks, procured from somewhere on the premises, were laid upon the I beams or other pipes or supports found at that height in the room. Whether one or more planks were used on the north and east side of the breeching is left in uncertainty, but the evidence shows three planks laid between the breeching and the walls—one along the south wall, one along the west wall, and one witness seems to think that another shorter plank was laid across the corner in some way. When plaintiff in obedience to Olson's order, as he claims, went to cut rivets between the breeching and the walls he had to pass over the plank laid along the south wall. It was insecurely placed at the west end and wobbled or tipped, causing plaintiff to fall.

The jury were justified in finding that this plank was placed there on Saturday, July 5, although Gust Wonhala, the man who worked with plaintiff at the time of the accident, testified that he and plaintiff procured the plank on Sunday forenoon and placed it in position.

The question presented is: Assuming that this plank was negligently placed in an unsafe position on Saturday, when plaintiff was working at another place, by one of defendant's servants, is defendant liable? The negligence charged was failure to provide plaintiff a safe place to work; negligence in constructing the staging or scaffold upon which plaintiff was ordered to work, particularly in respect to the plank mentioned; and other grounds not here important. The answer denied negligence, and set up contributory negligence, assumption of risk, and negligence of fellow servant as the sole causes of the injury.

The trial court thus charged the jury: "Of course, if the evidence of Mr. Wonhala, as given in this case, is true, and Mr. Quinn

did help him put that plank there, he cannot recover; and if the plank was placed there by some other member of the crew on Sunday, at a time when Mr. Quinn was engaged there with the crew in this common work, and the work on Sunday included the work of furnishing places upon which to stand as they progressed with their work, then Mr. Quinn cannot recover in this action; and he can only recover by showing by a preponderance of the evidence that the plank was placed there on Saturday at a time when he was not a member of the crew, that it was placed there for the express purpose of the men standing upon it to do the work, and that he was ordered and required to go upon the plank to do the work, that it was insecurely placed and that such insecurity was the cause of his falling down from it.

"If the plank was placed there by the defendant on Saturday for the purposes of a scaffolding or a staging, a question will arise as to whether or not it was a reasonably safe place.

"The duty of a master when furnishing a place in which his servant is to work requires him to use ordinary care to furnish a reasonably safe place in which to do the work, and it is for you to say whether or not the plank as placed was placed in a reasonably safe and secure manner."

No exception to the charge was taken on the motion for a new trial, nor is error assigned thereon in this court. Therefore, right or wrong, the instructions set out must be taken as the law of this case. *Smith v. Pearson*, 44 Minn. 397, 46 N. W. 849; *Bergh v. Sloan*, 53 Minn. 116, 54 N. W. 943; *Bates v. B. B. Richards Lumber Co.* 56 Minn. 14, 57 N. W. 218; *Kleis v. Travelers Ins. Co.* 118 Minn. 422, 136 N. W. 1101; *Bertram v. Bemidji Brewing Co.* 123 Minn. 76, 142 N. W. 1045. The question whether the negligent placing of the plank in position on Saturday affected the right of recovery cannot be considered under the assignments of error. Nor is the refusal to dismiss an available error here, if, when the evidence was all in, there was sufficient to go to the jury upon defendant's liability.

However defendant's assignments that he should have had judgment notwithstanding the verdict, and that there is no evidence to

sustain the verdict on the theory upon which the court did submit the case, are open for consideration here. *George A. Hormel & Co. v. American Bonding Co.* 112 Minn. 288, 128 N. W. 12, 33 L.R.A. (N.S.) 513. The two may be treated together. There is ample evidence that the plank which caused plaintiff's fall was negligently placed. Although there is some contradiction and confusion in the evidence, the jury could find that the plank along the west wall was so laid that the south end rested upon a bracket projecting from that wall, thence passing directly under a bolt near by, which extended from the wall some 12 inches, and that the west end of the plank from which plaintiff fell rested upon this bolt. The bolt, running lengthwise of the plank, would readily cause the plank to tip or wobble, especially if a person approaching the west end should not step directly over the center line of support furnished by the bolt. There is also some testimony to substantiate the claim that the plank was a necessary staging or appliance which the master undertook to furnish the men to stand on in doing their work and which was the master's nondelegable duty to furnish. Enough was shown in the situation to have warranted a submission to the jury of defendant's negligence in that respect. We cannot say, as matter of law, that the work was so simple that no plan for a staging was necessary or that it conclusively appears that the men themselves, as the work progressed and as an incident thereto, supplied such planks and staging as was rendered necessary, so as to exclude the case from the rule in *Sims v. American Steel Barge Co.* 56 Minn. 68, 57 N. W. 322, 45 Am. St. 451; *Hagerty v. Evans*, 87 Minn. 435, 92 N. W. 399; *Northrup v. Hayward*, 99 Minn. 299, 109 N. W. 241. Nor is there a failure of proof on the theory along which the trial judge instructed. The jury did not accept Gust Wanhala's testimony that the plank was placed in position on Sunday. Aside from his evidence there is nothing to show by whom it was placed, but there is substantial evidence from employees in the factory that no planks were between the breeching and the walls until defendant's crew began work on Saturday, upon which date they first noticed the planks there. We also think there is room for the inference that Mr. Olson on Saturday made preparation for the Sunday work

when the large crew was expected, and that this plank was placed on Saturday "for the express purpose of the men standing upon it to do the work," and that plaintiff was required to go upon the plank to work.

Is the verdict excessive? The neck of the femur of plaintiff's right leg was fractured, also there was some fracture in the shoulder joint. The trial took place eight months after the injury. The doctors were of the opinion that the surgical treatment afforded plaintiff had caused as good a union of the bones as could be expected. The leg was shortened about an inch. The callus thrown out at the point of the shoulder and at the neck of the femur interferes with the movement of the limbs. The experts do not doubt that he will have a serviceable leg and arm, though somewhat limited in movement, depending on the absorption of the callus. Plaintiff was bound to have a use both of his arm and leg according to his medical expert, although it might take a year more for a substantial recovery. Aside from the shortening of the leg the calluses seem to be the only baneful effect from the injury. One doctor testified that the absorption of a callus cannot be expected to begin until about eight months after the fracture begins to heal. No evidence of any medical or hospital expenses appears. At the time of the injury plaintiff was 49 years old, earning 25 cents an hour. He was a farmer and ordinary laborer. There is no injury or suffering except such as usually attend the painful recovery from a fracture where it is necessary to place weights on the limb to keep the bones in position. The verdict was for \$9,850. We consider it excessive, unless the anticipated improvement in the use of the limbs should fail to appear. We think therefore that a new trial should be had, unless plaintiff at this time deems \$7,000 a proper compensation which he is willing to accept.

The order, insofar as a new trial is denied, is reversed and a new trial is granted, unless plaintiff, within 10 days after the remittitur is sent down, file in the court below written consent to a reduction of the verdict to the sum of \$7,000. If such consent is filed no new trial shall be had.

Affirmed conditionally.

SERENA MOE and Another v. PETER B. PAULSON.<sup>1</sup>

January 29, 1915.

Nos. 18,951—(175).

**Will — evidence — undue influence.**

1. In a will contest case the evidence is considered and held sufficient to support the verdict of the jury to the effect that testatrix was mentally competent to make the will and that it was not procured by undue influence.

**Conversation with decedent — waiver of objection.**

2. Where a party who is entitled to object to evidence of a conversation with a deceased person, by a person interested in the event of the action, calls such witness and cross-examines him in reference to such conversation, he thereby waives the right to object to a full statement of the entire conversation. In re Hess' Estate, 57 Minn. 282, followed.

**Same.**

3. The rule applies, even though the questions put to the witness were intended to call only for statements made by him to the deceased. Such statements are necessarily a part of the conversation, and by calling them out the other party is entitled to the whole conversation.

**Charge to jury — reference to witness.**

4. The rule that special reference in the charge of the court to a particular witness, with the admonition to consider his interest in the result of the action, is error, does not apply where the court in such connection names practically all the witnesses so interested.

**Admission of incompetent evidence.**

5. Erroneous rulings admitting incompetent or immaterial evidence will constitute reversible error only when clearly prejudicial.

**Charge to jury.**

6. The charge of the court stated the rules of law applicable to the case with substantial correctness and without reversible error.

From an order of the probate court for Hennepin county admitting to probate the last will and testament of Karen Paulson, deceased, Serena Moe and others appealed to the district court for that county. The appeal was heard before Hale, J., and a jury which

<sup>1</sup> Reported in 150 N. W. 914.

answered in the affirmative the question whether Karen Paulson was of sound mind at the time she executed the will, and in the negative the question whether the will was procured by the exercise of undue influence by Peter B. Paulson. From an order denying their motion for a new trial notwithstanding the verdict, Serena Moe and Hannah Olson appealed. Affirmed.

*James A. Peterson, Lars O. Haug and K. T. Dahlen, for appellants.*

*Lind, Ueland & Jerome, for respondent.*

BROWN, C. J.

Karen Paulson, a resident of Hennepin county, died at her home in May, 1913, leaving what purported to be her last will and testament, in and by which she devised and bequeathed all her property to her son, Peter B. Paulson, respondent herein. She left surviving four other children, all of mature years, who contested the allowance and probate of the will on the grounds that testatrix was of unsound mind at the time it was executed, and that she was procured and induced to make it by the undue influence of the beneficiary, her son Peter. The probate court sustained the will, and contestants appealed to the district court, where the issues were submitted to a jury. The jury found that testatrix was of sound mind and that the will was her free act and deed uninfluenced by her son. Contestants moved for judgment notwithstanding the verdict or for a new trial. The motion was denied and two of the contestants, Hannah Olson and Serena Moe, appealed.

The assignments of error challenge the sufficiency of the evidence to support the verdict, rulings of the court on the admission and exclusion of evidence, and the charge of the court to the jury.

1. The question whether the evidence supports the verdict does not require extended discussion. The evidence on the trial took a wide range, and considerable latitude was given the contestants in the admission of testimony. We have read it with care and find therein ample evidence to support the conclusion that testatrix was mentally competent to make the will, that she fully understood all its provisions, and that it in fact represents her wishes as to the

disposition of her property. The will was drawn by an attorney of high standing in the profession, and from information given and communicated to him by testatrix at the time. While she was then ill, having previously suffered a paralytic stroke, her mind was unaffected, and she retained a clear memory of all her property interests. Testatrix with her husband had resided in Minneapolis for many years, during which they accumulated considerable property. This consisted of residence and business properties, the most of which was rented to tenants, and yielded a comfortable income. Shortly after the death of her husband, which occurred some time in the year 1911, she made a partial distribution of her property among her children. She conveyed to each, including the son Peter, a house and lot, of about equal value, and otherwise at times contributed to each. At the time of this distribution she expressed the intention of giving the remainder of her property to her son Peter; and this intention was generally known to members of her family. She retained this intention up to the time the will was made, the terms and provisions of which were also made known to the other children. That she had the right to do this, and to discriminate in favor of the son cannot be questioned. And if made in sound mind and without fraud or undue influence the law cannot step in and declare that the preference of the son was wrong. The evidence fully sustains the claim that she was of sound and disposing mind, and we find no evidence from which it may be said that any undue or other influence was exerted by the son. The will was but the consummation of an intention on her part which she entertained for some time, and which she had expressed to others, and since the court has approved the verdict we find no sufficient reason for interference.

2. A large number of errors are assigned to rulings of the court in the admission of evidence, many of which do not require special mention. A good portion of them are now urged in connection with the contention that the trial court abused its discretion in the rulings complained of, and to such an extent that contestants were prevented from having a fair trial. It is sufficient answer to these assignments, that the question whether the court below was chargeable with misconduct in its rulings which prevented a fair trial, was not made one

of the grounds of motion for a new trial, and the question is not therefore properly before us. We may say, however, that we discover no reason for so characterizing the rulings or conduct of the trial court. We are therefore confined in the consideration of these assignments to the question whether any error was committed of a nature clearly prejudicial, and such as to justify a new trial of the action. We find no such errors. Though some of the rulings may have been technically incorrect, contestants were in no substantial way prevented from fully presenting their case. Some of the evidence claimed to have been erroneously excluded was subsequently admitted, and other portions thereof were of no substantial probative force or value. It may also be said that perhaps technical error was committed in the admission of certain items of evidence. We need not refer particularly to them, for we have examined them all and find no reason for holding any of such rulings reversible error. While it has often been said that error committed upon the trial of an action is presumptively prejudicial, and such is perhaps the general rule, the presumption in recent years has not been given effect blindly, and it is now with practical unanimity held that prejudice in fact must appear before a reversal will be ordered; particularly for error in the admission of immaterial evidence, though the rule is different where competent and material evidence has been erroneously excluded. *Whitaker v. Chicago, St. P. M. & O. Ry. Co.* 115 Minn. 140, 131 N. W. 1061. We discover in the case at bar no reason for holding that any of the rulings complained of resulted prejudicially to appellants.

3. One of the assignments of error in this connection deserves special mention. Respondent, beneficiary in the will, was called by contestants as a witness on cross-examination, and interrogated to some extent in respect to a conversation had with his mother, testatrix, before her death, in respect to the disposition of this property after she had passed away. The questions put to the witness in the main called for things said by the witness to his mother, and in answer thereto he stated things that the mother had said to him. Whereupon his counsel was permitted to bring out the entire con-

versation with his mother. This was objected to as calling for a conversation with the deceased, by a witness interested in the result of the action, and a violation of the statute upon that question. Section 8378, G. S. 1913.

This statute declares that it shall not be competent for any party to an action, or any person interested in the event thereof, to give in evidence any conversation with, or admission of, a deceased party, relative to any matter in issue between the parties. The statute is not an absolute prohibition of such evidence, and the right to exclude it when offered may be waived. The right to exclude it is waived when the party entitled to object to its reception by cross-examination requires the prohibited witness to state the conversation or a part thereof. In *re Hess' Estate*, 57 Minn. 282, 59 N. W. 193. Such was the situation in the case at bar. Contestant called for cross-examination of the adverse witness and interrogated him in reference to things said by him to deceased and things said by her to him. Under the case just cited the court properly permitted counsel for respondent to bring out the entire conversation. Such is the general rule under statutes of this kind. 4 Jones, Evidence, § 780. But counsel for appellant insists that his questions to the witness were intended to call from the witness only certain statements by him to deceased in reference to a division of the property after her death. If this be conceded, the difficulty is in no manner relieved. The evidence so sought to be brought out was necessarily a part of a conversation with deceased (*Peterson v. Merchants Ele. Co.* 111 Minn. 105, 126 N. W. 534, 27 L.R.A.[N.S.] 816, 137 Am. St. 537), and had reference to the will subsequently made by her and tended to show, had favorable answers been given, an agreement on his part to divide the property with contestants. We think evidence of this character comes clearly within the statute, and the cross-examination was a waiver and opened the door to respondent to state the whole conversation. 4 Jones, Evidence, 781, and authorities there cited.

4. The charge of the court is challenged by numerous assignments, but a careful examination thereof taken in its entirety discloses no sufficient reason for characterizing it as unfair or as containing in

any of the portions excepted to, reversible error. The instructions were comprehensive and clear, covering all phases and features of the case, and fairly left the issues to the determination of the jury. Perhaps the charge, taking the parts thereof to which exception was taken, is open to some of the criticisms of counsel, but there was no substantial error. The fact that the court referred by name to some of the witnesses and the interest they appeared to have in the controversy was not reversible error, for the court also included the names of all those who were interested and had expressed an opinion of the mental capacity of testatrix, including respondent. Instructions in this respect should be in general terms, and not by reference to a particular witness. *Harriott v. Holmes*, 77 Minn. 245, 79 N. W. 1003. But the reason for holding that the mention of the name of one witness, and cautioning the jury to take into consideration his interest in the outcome of the litigation, does not apply where the court names practically all the witnesses on both sides of the case who are thus interested. The failure of the court to instruct the jury in reference to the burden of proof was not error, for the reason that no request for such instruction was submitted. We think also, and so hold, that the instructions stated with substantial correctness what constitutes mental capacity, and what constitutes undue influence, the only issues in the case, and the contention to the contrary is not sustained. And taking the charge as a whole we hold that no substantial error was committed in stating the law of the case. If there were any verbal inaccuracies, request to clear them up should have been made at the trial.

Judgment affirmed.

**H. W. OTOS v. GREAT NORTHERN RAILWAY COMPANY.<sup>1</sup>**

January 29, 1915.

Nos. 18,955—(182).

**Interstate commerce.**

1. A car in process of transportation from one state to another is in transit and is being used in interstate commerce while being switched at an intermediate yard with other interstate cars, although there may be a purpose to switch the defective car to a repair track for repair of a defective coupler before it leaves the yard. The Federal Safety Appliance Act and the Employer's Liability Act apply to such a car.

**Injury to brakeman — proximate cause.**

2. The act of a switchman in stepping between moving cars to make an uncoupling because of a defective coupler is not the sole proximate cause of an injury received by him while so doing. The violation of the statute is a contributing cause of the injury.

**Damages not excessive.**

3. The damages as reduced by the trial court are not excessive. Defendant was not entitled to a reduction of the amount of plaintiff's damages because of a prospect that a surgical operation might relieve part of his injury.

Action in the district court for Yellow Medicine county to recover \$80,000 for personal injuries sustained while brakeman in defendant's employ. The case was tried before Flaherty, J., and a jury which returned a verdict in favor of plaintiff for \$35,000. Defendant's motion for judgment notwithstanding the verdict was denied, and its motion for a new trial was granted unless plaintiff consented

<sup>1</sup> Reported in 150 N. W. 922.

---

Note.—On the question of the constitutionality, application, and effect of the Federal Employer's Liability Act, see note in 47 L.R.A.(N.S.) 38. And as to the duty and liability of the master under the Federal and State Railway Safety Appliance Acts, see notes in 20 L.R.A.(N.S.) 473 and 41 L.R.A.(N.S.) 49.

The question whether the negligent condition of a place or appliance is the proximate cause of injuries not primarily caused by that condition is considered in a note in 40 L.R.A.(N.S.) 940.

to a reduction of the verdict to \$30,000. From the order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

*M. L. Countryman and A. L. Janes*, for appellant.

*John I. Davis, Tom Davis and Ernest A. Michel*, for respondent.

HALLAM, J.

Plaintiff was a switch foreman in defendant's yards at Willmar. On September 11, 1912, a train came into Willmar from the west. It contained, among others, a loaded car from Willow Lake, South Dakota, consigned to Minneapolis. This car was coupled with automatic couplers to a car consigned to Duluth, by way of Superior, Wisconsin. The pin lifter on the Minneapolis car was out of order. At Willmar the Duluth car was to be transferred to another train. There is some evidence that the Minneapolis car was to be switched to the repair track, before it proceeded further, for the purpose of repairing the coupler. There is no evidence that it was ever so transferred. The car was carried to Minneapolis on the following day. Plaintiff and his crew were engaged in cutting up this train and switching the cars to be removed from it to their proper destination. At the time of the accident he had three cars attached to a switch engine; the Duluth car was in the rear and the Minneapolis car in the middle. Plaintiff was about to cut off the Duluth car in order to switch it to the Duluth track. He stood on the side from which the pin lifter was missing. He could not make the uncoupling from that side without going in between the cars. This he did, and in doing so he was run over and sustained severe injuries.

It is conceded that defendant's road at Willmar is a highway of interstate commerce and that the traffic in which this car was engaged when in transit was interstate traffic, and that if it was in transit at this time, then, under the Federal Safety Appliance Acts and Employer's Liability Act, defendant is liable for any injury caused by the defective coupler, and neither contributory negligence nor assumption of risk constitutes any defense. The contention of defendant is that "the condition of the car was such that it had to go to a repair track for repairs;" that "it was necessary that the through

movement of the car be interrupted at Willmar for the purpose of repairs," and that therefore "the defective car had been withdrawn from commerce" and was "not in the course of transit."

We are of the opinion that at the time of plaintiff's injury this defective car was in transit and was being used in interstate commerce. A car in process of transportation from one state to another is usually in transit and engaged in commerce from the time it is started upon its passage until the delivery of its cargo at the place of destination. *U. S. v. Colorado & N. W. R. Co.* 157 Fed. 321, 85 C. C. A. 27, 15 L.R.A.(N.S.) 167, 13 Ann. Cas. 893. It is not taken out of commerce because in need of repair, nor because of a purpose to repair it, nor because of a design to set it upon a repair track in due course for that purpose. We need not consider what the situation might have been if this car had been set at rest on the repair track. This had not been done. At the time of the accident it was still part of an interstate train. Its cargo had not reached its destination and was not ready for delivery to the consignee. It was attached to and was being moved with another interstate car, from which it was in due course being uncoupled. Clearly the defective car was in transit and was being used in interstate commerce.

The Federal decisions leave no doubt upon this point.

In *Delk v. St. Louis & San Francisco R. R. Co.* 220 U. S. 580, 31 Sup. Ct. 617, 55 L. ed. 590, a car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked "in bad order," and a repair piece sent for, but the company kept on moving it about in connection with other cars, and finally ordered the injured employee to couple it to another car. This he tried to do and was injured. It was held that the car in question was being used in interstate traffic.

In *Chicago, M. & St. P. Ry. Co. v. United States*, 165 Fed. 423, 91 C. C. A. 373, 20 L.R.A.(N.S.) 473, it was said that, if a car is one of the connecting links between the engine and the caboose and a constituent part of a train moving on an interstate mission, the car is engaged in interstate commerce. See also *Erie R. Co. v. Russell*, 183 Fed. 722, 106 C. C. A. 160; *Southern Ry. Co. v. Snyder*, 205 Fed. 868, 124 C. C. A. 60.

2. Defendant contends that the proximate cause of plaintiff's injury was not the defective condition of the coupling, but his violation of a rule of the employer forbidding employees going between moving cars. It appears that there was such a rule. There is evidence that in this yard it had, with the knowledge of the yardmaster, been more honored in its breach than in its observance. But, whatever may be said of the propriety of plaintiff's act in going between the cars, it was only one of the concurring causes of plaintiff's injury. The violation of the statute was one cause of his injury. *Turritin v. Chicago, St. P. M. & O. Ry. Co.* 95 Minn. 408, 104 N. W. 225; *Sprague v. Wisconsin Cent. Ry. Co.* 104 Minn. 58, 116 N. W. 104. This is all that is necessary to create liability. The statute which abolishes contributory negligence "would be nullified by calling plaintiff's act the proximate cause, and then defeating him, when he could not be defeated by calling his act contributory negligence.

\* \* \* It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act." *Grand Trunk Western Ry. Co. v. Lindsay*, 233 U. S. 42, 47, 34 Sup. Ct. 581, 582, 58 L. ed. 838, Ann. Cas. 1914C, 168, quoting 201 Fed. 844, 120 C. C. A. 166.

3. The jury assessed plaintiff's damages at \$35,000. The trial court reduced the amount to \$30,000. Plaintiff was 26 years old at the time of his injury and was earning from \$105 to \$115, a month. His left leg was amputated within two inches of the hip joint, so close to the body that the use of an artificial leg is impossible. There was not sufficient skin to cover the stump, and scar tissue was formed. Four different operations have been performed for the purpose of engrafting skin upon the stump. Several more were performed to remove cinders or to open abscesses that had formed. Two nerve tumors have formed upon the stump, caused by the ends of the nerves being imbedded in the scar tissue. These are intensely painful to the slightest touch, and they cause intense spasms of pain on pressure or movement. From some cause, perhaps because of these nerve tumors, plaintiff suffers intense pain in the small of the back so that he can neither sit up nor use a crutch. There is evidence

that these conditions are permanent, in fact it is conceded that they can only be relieved by further surgical operation.

Defendant contends there is a practical way of improving plaintiff's condition. It offered evidence that the nerve tumors may be removed by a surgical operation and that their removal will remove the cause of pain in the stump and in the back, and to all intents and purposes restore plaintiff's general health. Defendant claims it is the duty of plaintiff to submit to such operation, or, if he chooses not to do so, that the injuries which may be remedied by an operation should not be considered in measuring his damages. This suggested operation is described as follows: "Cut down on the stump and resect these diseased nerve endings, pulling them out and cutting off higher up, and then by stitching the end of the cut nerve together, pulling it over, to prevent a recurrence of a similar condition, and sewing the end up so as to leave no raw surface exposed." It is conceded that after such an operation there is liability of recurrence of these nerve tumors, and that in some cases as many as three operations have been required.

We are of the opinion that plaintiff was entitled to an assessment of damages based on the condition he was in at the time of the trial. A person who sustains damage at the hands of another, whether through breach of contract or through tort, is required to take all reasonable measures to reduce his damage, but we cannot carry this doctrine to the extent of holding that this plaintiff, who had already submitted to an amputation which a "great proportion of men \* \* \* do not survive," and a number of lesser operations, is under any obligation to submit to another surgical operation of the character described in pursuit of an uncertain prospect of lessening his injury and his damage. *Maroney v. Minneapolis & St. L. R. Co.* 123 Minn. 480, 144 N. W. 149, 49 L.R.A.(N.S.) 756, and cases cited.

There is some evidence that plaintiff's injury has caused permanent impotence, due to the interruption of the course of certain nerves. The testimony on this subject is sharply in conflict. Injury of this sort is very easy to feign or exaggerate and very hard to disprove. Temporary loss of sexual power is the usual concomitant of almost

every severe injury or illness, and cannot usually be considered as a distinct element of damage. *Bucher v. Wisconsin Cent. Ry. Co.* 139 Wis. 597, 120 N. W. 518. At the same time, where there is tangible proof that by reason of direct injury to the generative organs or the nerves that prompt their action, and resulting impotence, there is no good reason why this element may not be considered. Where the proof rests upon opinion evidence, it should be closely scrutinized, but it cannot in all cases be rejected entirely. In this case there is evidence of injury to the pudic nerve, and also evidence that every known test indicates present impotence, and there is expert evidence based upon this alleged organic injury that impotence will be permanent. We think the court cannot say as a matter of law that this evidence should have been wholly disregarded. However, it seems to us that this verdict can be sustained without resting largely upon this claim. Aside from this element of damage, the case is in no sense parallel to those involving the mere loss of one leg. In fact many men who have sustained amputation of both legs, as in *Sprague v. Wisconsin Cent. Ry. Co.* 104 Minn. 58, 116 N. W. 104; *Whitehead v. Wisconsin Cent. Ry. Co.* 103 Minn. 13, 114 N. W. 254, 467, are in no worse plight than this plaintiff. We are not disposed to further disturb the amount of this verdict.

Order affirmed.

---

PETER LYONS v. NELS WESTERDAHL.<sup>1</sup>

January 29, 1915.

Nos. 18,956—(183).

**Mechanic's lien — foreclosure — verification of pleading.**

1. Where, in an action to foreclose a mechanic's lien, a party verifies his

<sup>1</sup> Reported in 150 N. W. 1083.

---

Note.—On the question of the removal, removability, or destruction of work or improvement as affecting lien on the property improved, see note in 41 L.R.A.(N.S.) 296.

As to the effect of filing an excessive mechanics' lien, see note in 29 L.R.A.(N.S.) 306.

pleading by an affidavit that the averments therein are true of his own knowledge, and such pleading states positively that the attached bill of items is true and correct, this constitutes a sufficient verification of such bill of items.

**Lighting fixtures.**

2. Under the rule stated in *Capehart v. Foster*, 61 Minn. 132, that lighting fixtures do not become a part of the realty, at least under ordinary circumstances, it is held that the value of such fixtures was improperly included in the amount adjudged to be a lien upon the property.

**Statement of lien — claiming more than due.**

3. One of the lien claimants performed his contract only in part, but filed a lien for the amount which would have been due had he performed the contract in full. Held that he knowingly claimed more than was justly due, and thereby divested himself of all right to a lien against the property.

Action in the district court for Hennepin county to foreclose a mechanic's lien. The case was tried before Steele, J., who made findings and ordered judgment in favor of the respective parties as set forth in the opinion. From the judgment entered pursuant to the order for judgment, defendant Westerdahl appealed. Modified.

*A. B. Darelius*, for appellant.

*Herbert T. Park*, for respondents.

**TAYLOR, C.**

This is an action to foreclose the mechanic's liens filed against a house and lot in the city of Minneapolis. The trial court made findings of fact and conclusions of law, and rendered judgment pursuant thereto, establishing liens upon the property as follows: In favor of defendant Bruer Bros. Lumber Co. for the sum of \$1,707.54; in favor of defendant Ireland-Simmons Co. for the sum of \$377.02; and in favor of defendant Western Heating Co. for the sum of \$669.02. It was also adjudged that these liens were paramount and superior to a mortgage held by defendant Westerdahl. Defendant Westerdahl appealed from the judgment.

1. The liens, so far as valid and subsisting, are paramount to the mortgage.

The statute provides: "Each lienholder shall attach to and file  
128 M.—19.

with his complaint or answer a bill of the items of his claim, verified by the oath of some person having knowledge thereof, and shall file such further and more particular account, as the court may at any time direct. Upon his failure to file such original or further bill, his pleading shall be stricken out and his claim disallowed." G. S. 1913, § 7031.

None of the above lien claimants made a separate verification of the bill of items attached to their respective answers; but each answer was verified, and stated in substance that a true and correct statement of the items of labor and material furnished, and of the value thereof, was thereto attached, marked Exhibit A, and made a part thereof. At the trial appellant moved to strike out the several answers on the ground that the bill of items was not verified as required by the above statute, and assigns the denial of such motions as error.

The statute requires that the correctness of the bill of items shall be supported by the oath of some person having knowledge thereof. The pleading may or may not be verified, but the bill of items must be verified. If a party verifies his pleading by an affidavit that the averments therein are true of his own knowledge, and the pleading states directly and positively that the attached bill of items is true and correct, we think that this constitutes a sufficient verification of such bill of items. Under this rule the answers in question are not open to the objection urged. Appellant also urges that one of the verifications was defective in failing to state that the affiant knew the contents of the pleading which he verified. The verification states that he had read the pleading and that it was true of his own knowledge, and we think this shows sufficiently that he knew its contents. As the above are the only objections urged against the claim of Bruer Bros. Lumber Co., the judgment in favor of that company is affirmed.

2. The claim of the Ireland-Simmons Co. includes the sum of \$120 for electric lighting fixtures. These fixtures appear to be such as are ordinarily kept in stock for sale by dealers in such articles; it does not appear that they were designed, constructed, or prepared for this particular building. Neither is there any evidence tending to show the intent with which the parties caused them to be placed in the building. The naked fact appears that they were installed therein,

nothing more. It was decided in *Capelhart v. Foster*, 61 Minn. 132, 63 N. W. 257, 52 Am. St. 582, that gas lighting fixtures did not become a part of the realty under such circumstances, and the same rule must be applied to electric lighting fixtures. It follows that the Ireland-Simmons Co. are not entitled to a lien upon the realty for the value of such fixtures.

3. The Western Heating Co. had the contract to install the heating plant and do the plumbing in the building and to furnish the material therefor. A partial payment was to be made when what is termed the "roughing in" was finished. This payment was not made, and thereupon the heating company quit work and refused to complete the contract. Thereafter they filed a lien for the full amount to which they would have been entitled had they fully completed their contract. At the trial they conceded that the unperformed portion of the contract exceeded \$150 in value; and that the amount claimed in the lien statement exceeded the amount due them by that sum. The statute provides:

"In no case shall a lien exist for a greater amount than the sum claimed in the lien statement, nor for any amount whatever, if it be made to appear that the claimant has knowingly demanded in such statement more than is justly due." G. S. 1913, § 7085.

The legislature intended to prevent the padding of such claims, and this statute must be given effect according to its terms. It provides that a lien claimant, who, in his lien statement, knowingly demands more than is justly due, shall have no lien whatever. In the present case the lien statement demanded fully 20 per cent more than was justly due. The heating company knew that they were making a claim for all the material and all the labor that would be required to complete the contract in full. They also knew that they had not completed the contract, and necessarily knew that they were attempting to acquire a lien for material not furnished and for labor not performed. The admitted facts are such that the statute divests them of the right to a lien and the judgment must be modified accordingly.

Other courts apply the same rule under statutes less drastic than our own and to facts more excusable than those here presented. *Stubbs v. C. C. S. & S. W. Ry. Co.* 65 Iowa, 513, 22 N. W. 654;

Gibbs v. Hanchette, 90 Mich. 657, 51 N. W. 691; Brennan v. Miller, 97 Mich. 182, 56 N. W. 354; Bohn Mnfg. Co. v. Keenan, 15 S. D. 377, 89 N. W. 1000; Reeve v. Elmendorf, 38 N. J. Law, 125.

The cause is remanded with directions to modify the judgment to conform to the views hereinbefore expressed.

---

**SOPHIA DYBVIG v. MINNEAPOLIS SANATORIUM and  
Another.<sup>1</sup>**

January 29, 1915.

Nos. 18,964—(188).

**Action for services — evidence.**

1. Evidence in an action to recover for services rendered by plaintiff at defendants' request, in nursing a patient at a sanatorium, *held* sufficient to sustain a recovery as upon an express contract, established by reference to the terms under which prior services of the same general character were rendered by plaintiff for defendants, supplemented by the conduct of the parties.

**Rulings on evidence.**

2. There was no reversible error in the rulings concerning evidence or in the instructions.

Action in the municipal court of Minneapolis to recover \$240 for work and services as a professional nurse. The case was tried before Charles L. Smith, J., and a jury which returned a verdict in favor of plaintiff for \$248.72. From an order denying defendants' motion for judgment notwithstanding the verdict or for a new trial, they appealed. Affirmed.

*Nathan H. Chase*, for appellants.

*Wilbur H. Cherry* and *Hugo Lundborg*, for respondent.

<sup>1</sup> Reported in 150 N. W. 905.

PHILIP E. BROWN, J.

Plaintiff had a verdict in an action to recover for services alleged to have been rendered defendants on express contract. Defendants appealed from an order denying their alternative motion.

The evidence warranted the jury in finding the following facts: Defendant sanatorium conducted a general hospital in Minneapolis, defendant Baker being its secretary, treasurer and general manager. Plaintiff, a trained nurse, on March 15, 1913, at defendants' request, commenced to care for a patient in the said hospital. Before she entered the employment defendants inquired concerning her charge per week. She replied: "Twenty-five dollars," to which the response was made: "All right." She continued to nurse this patient for three weeks, and thereafter received payment therefor through defendant Baker. After the expiration of a week she was again called to the hospital by defendants and took charge of another patient for one week, for which service she was similarly paid. After an interval of one day she cared for a third case in the same manner and was paid in the same way. She remained at the hospital and immediately took up a fourth case, which employment continued for more than five weeks there, and for three weeks longer at the patient's home, the latter service not being rendered in connection with defendants. Whether the five weeks service was paid for does not appear. Later, on June 11, 1913, she was again called to the hospital by defendant Baker and at defendants' request nursed another patient for more than 10 weeks, for which she was not paid. Defendants at various times promised payment generally for the service, both during its rendition and afterwards, but no definite sum was mentioned and nothing was said concerning the amount of plaintiff's charges after the first conversation referred to. The recovery here sought was for the alleged agreed compensation of \$25 per week claimed to have been earned after the date last mentioned. Defendants concede the employment in question was performed wholly upon their request.

The assignments of error hinge upon the claim that the recited facts neither established the right to nor justified a recovery upon an express contract, because all evidence relating to plaintiff's employments by defendants other than the one made the basis of this action,

was incompetent under the pleadings. It may be conceded that plaintiff was bound to establish an express contract, or fail in her suit. But such form of contract may be inferred from the acts of the parties as well as their spoken words. *Musgrove v. City of Jackson*, 59 Miss. 390, 392; *Keener, Quasi Contracts*, 4; *Clark, Contracts*, § 3; 9 Cyc. 245b. And the contract here involved belongs to that class described by Mr. Leake as being "of a mixed character in respect to the mode of making them, that is to say, partly expressed in words and partly implied from acts and circumstances." *Leake, Contracts*, 8. Both are to be taken into account in determining whether a contract was made; the law imputing to a person an intention corresponding to the reasonable meaning of his words and actions.

If, then, it fairly appears from their conversations and acts that the minds of the parties met on the proposition that plaintiff was to receive a stated sum per week for her services declared upon, an express contract was established; their acts and words being mutually supplementary and everything said and done during the prior employments tending to throw light upon their actual understanding being competent. From these it is difficult to deduce other than an agreement by defendants to pay and by plaintiff to accept for the services last rendered the price first agreed upon. Of course there was an express contract as to both parties, if as to either; and we think plaintiff would have encountered insurmountable difficulties if upon a *quantum meruit* she had attempted to recover more than \$25 per week for such services, even if they were in fact worth more; especially as no claim was made of any material difference in the nature of the work done in the various cases nursed by her. A pertinent analogy is where an employment is continued after the expiration of the term without a new stipulation as to the price; in which case a rebuttable presumption of fact arises that the parties intended their original agreement as to compensation to continue in force. In such a case the recovery would not be upon a *quantum meruit*, but upon an express contract; the true question being whether the minds of the parties met upon the continuation of the service, at the old price. *Ingalls v. Allen*, 132 Ill. 170, 174, 23 N. E. 1026. And, of course, facts and circumstances might be shown to rebut the in-

ference that such was their intention. *Pearson v. Switzer*, 98 Wis. 397, 74 N. W. 214.

The court charged substantially that if, when plaintiff was called to perform the services in question, each party understood she was to receive \$25 per week therefor, such would be an express contract; but that such an understanding could not be inferred, unless from their continued course of dealing it was found that on the day plaintiff commenced her last employment each party so understood. This was equivalent to saying that if the service was a continuation of the original nursing and within the general scope of the former employment, to the understanding of both parties, plaintiff should recover.

We hold the proof sufficient to establish an express contract and find no reversible error.

Order affirmed.

---

CHARLES J. TRAXLER v. MINNEAPOLIS CEDAR &  
LUMBER COMPANY.<sup>1</sup>

January 29, 1915.

Nos. 18,967—(187.)

**Attorney and client.**

1. The evidence conclusively established that plaintiff was employed by defendant to perform legal services for it.

**Same—implied power of president of corporation.**

2. A president of a corporation ordinarily has implied power to retain an attorney to defend an action brought against the corporation, especially when the attorney so retained has acted as such for the corporation in prior matters.

**Board of directors—oral evidence of action.**

3. Oral evidence of action of the board of directors of a corporation is properly admitted against the objection that it is not the best evidence, when it does not appear that any written evidence of such action exists.

<sup>1</sup> Reported in 150 N. W. 914.

**Verdict — evidence.**

4. The evidence sustains the verdict as to amount.

**Charge to jury.**

5. There was no error in any ruling on the admission of evidence or in the charge.

Action in the municipal court of Minneapolis to recover \$500 for professional services as attorney for defendant. The case was tried before Montgomery, J., and a jury which returned a verdict in favor of plaintiff for \$400. From an order denying defendant's motion for a new trial, it appealed. Affirmed.

*Paul J. Marwin*, for appellant.

*S. R. Child*, for respondent.

**BUNN, J.**

Plaintiff, a duly licensed attorney at law, brought this action to recover \$500, the alleged value of legal services performed for defendant corporation. The answer contained a general denial, and an allegation that the services were not performed for the corporation, but for two of the directors thereof personally. At the close of the evidence the court instructed the jury that plaintiff was entitled to recover the reasonable value of his services. The jury returned a verdict of \$400, and defendant appealed from an order refusing a new trial.

Plaintiff, who had on prior occasions acted as attorney for defendant corporation, was retained by its president to defend an action brought by certain stockholders against the corporation and certain of its officers, including its president, to enjoin the sale of a portion of the assets of the corporation, and for the appointment of a receiver thereof. He performed services in preparing the case for trial.

The first claim of defendant is that plaintiff was not employed by defendant. The evidence is conclusive that he was.

It is urged that the president had no authority to employ counsel for the corporation. In view of the employment of plaintiff by defendant as its attorney in prior matters, this claim cannot be sustained. The president had implied power to retain plaintiff. 10

Cyc. 904, and cases cited. *Grant v. Duluth M. N. R. Co.* 66 Minn. 349, 69 N. W. 23.

Furthermore, there was evidence of express authority by the board of directors. It is claimed here that oral evidence of the action of the board in this respect was improperly admitted, as violating the best evidence rule. It did not appear that there was any written evidence of the board's action, and for this reason there was no error in not sustaining defendant's objection to the oral evidence.

It also appeared that the corporation accepted and profited by plaintiff's services.

It is therefore clear that the trial court was justified in instructing the jury that plaintiff was entitled to recover, and we so hold.

The amount of the recovery is questioned, but there is no ground for disturbing the verdict in this regard. The evidence amply justified the finding that plaintiff's services were worth \$400.

The other assignments of error, challenging rulings on the admission of evidence, and portions of the charge, have been examined, and are found to be without merit and to require no discussion.

Order affirmed.

---

## GEORGE JOHNSON v. UNITED FLOUR MILLS COMPANY.<sup>1</sup>

January 29, 1915.

Nos. 18,971—(196).

**Injury to servant—assumption of risk.**

Evidence in an action to recover damages for injuries alleged to have

<sup>1</sup> Reported in 150 N. W. 902.

---

Note.—The question whether the servant may assume the risk of dangers created by the master's negligence is treated in notes in 4 L.R.A.(N.S.) 848 and 28 L.R.A.(N.S.) 1215. And upon the servant's assumption of risk of defective tool, machine, or appliance, where the defect is obvious, but its importance not appreciated, see note in 13 L.R.A.(N.S.) 691.

been caused by defendant's failure to furnish plaintiff, its servant, with a safe place to work and proper appliances, and its unsafe methods of work, whereby a bag of oats fell on plaintiff while he was unloading an elevator, held conclusively to establish the defense of assumption of risk.

Action in the district court for Brown county to recover \$12,525 for injuries received while in the employ of defendant. The case was tried before Olsen, J., who denied defendant's motion to dismiss the action, and a jury which returned a verdict for \$725.50. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed with directions to enter judgment for defendant.

*Albert Hauser*, for appellant.

*Davis & Berg*, for respondent.

PHILIP E. BROWN, J.

Appeal by defendant from an order denying its alternative motion, after verdict for plaintiff, in an action to recover damages for personal injuries alleged to have been caused by defendant's negligence.

About 10 years prior to the accident plaintiff commenced to work for defendant in its mill at Sleepy Eye. Some three years thereafter it installed an elevator from the first to the third floor, consisting of a continuous rubber belt running over pulleys. Steps made of two boards 23 inches long and 14 inches wide, set at right angles to each other, were hinged to the belt, so that in descending one of the boards of the triangle constituted the step, and in ascending the other. These steps were without flanges, guards, or devices of any kind to prevent articles placed thereon from falling either through vibration or waving of the belt or otherwise. This type of elevator has been in general use in up-to-date mills for the last 25 years, for the purpose of lifting and lowering passengers, bags and materials. About a year after the one in question was installed, defendant commenced to use it for the purpose of raising and lowering products in bags, and plaintiff, whose duties were, at all times while in defendant's employ, those of a "roustabout," or man of all work, then began both to remove and to place them on the elevator. He continued so to do for about two years, when he left defendant's employ. Some two years

later he re-entered its service and worked two weeks, doing the same kind of work. He then again quit, returning to work for defendant on July 18, 1913. Some two hours thereafter, while engaged in taking sacks of oats from the elevator, he was struck by one falling from above, and sustained the injuries for which he seeks a recovery. The elevator remained in the same condition during all the times mentioned, and was operated and the work done substantially in the same manner.

The negligence charged and relied on was failure to furnish plaintiff a safe place in which to work, with safe appliances, and to use safe methods in conducting the business; his specific claim being that the bag of oats fell from one of the elevator steps above him because of its unguarded condition. Assuming then that the accident so occurred and defendant was thereby chargeable with negligence, the only question necessary to be considered is whether it conclusively appears that plaintiff assumed the risk.

In addition to what has been stated, plaintiff testified, and there is nothing in the record to the contrary, that he knew bags fell off the steps every little while, and that if they were not properly placed thereon they were liable to fall off; also that the jar and wave of the belt might throw sacks off, even if properly placed; that it was his custom to look up occasionally to see whether any of them were falling; and that he had done this just before the accident occurred. No question of statutory duty to guard is involved in this case, but the general doctrine of assumption of risk is well stated in *Blom v. Yellowstone Park Assn.* 86 Minn. 237, 90 N. W. 397:

"If the instrumentalities furnished by the master for the performance of the servant's duties are defective," said Chief Justice Start, at page 239, "and the servant not only knows this, but also knows and understands, or ought in the exercise of ordinary prudence to understand, the risks to which such defects expose him, he assumes the risks incident to the use of such defective instrumentalities."

This rule applies to risks incident to both places in which to work and to unsafe business methods. 2 Dunnell, Minn. Dig. §§ 5972, 5978. And while the doctrine of assumption of risk is not favored, and the burden rested on defendant to establish the defense, we are

constrained to hold that, under the simple situation presented, every element clearly appeared and the defense was conclusively established. *Dobreff v. St. Paul Gaslight Co.* 127 Minn. 286, 149 N. W. 465; *Falkenberg v. Bazille & Partridge*, 124 Minn. 19, 144 N. W. 431, 2 Dunnell, Minn. Dig. § 5979, and sections above cited.

Order reversed with directions to enter judgment for defendant.

---

## STATE v. BROOKS-SCANLON LUMBER COMPANY and Others.<sup>1</sup>

January 29, 1915.

No. 18,985—(12).

### Complaint construed — cutting timber on state land.

1. A complaint alleging that one cut timber upon state lands without a permit such as is required by Laws 1895, c. 163, § 7 (R. L. 1905, § 2442), states a cause of action in trespass, though words equivalent to "wrongfully" or "wilfully" are not used; and the holder of such a permit, lawfully in possession for the purpose of cutting timber of not less than a specified size, is a trespasser in cutting timber of less than such size.

### Limitation of action.

2. By Laws 1905, c. 204, § 43 (G. S. 1913, § 5302), all limitation upon the time for bringing suit for a trespass on state lands is removed; and the statute is applicable to the situation stated in paragraph 1 though the trespass was prior to its enactment.

### Constitution — title of act.

3. The statute cited is not unconstitutional as in contravention of art. 4, § 27, of the Constitution providing that "no law shall embrace more than one subject, which shall be expressed in its title."

### Joint demurrer.

4. A complaint is good against a joint demurrer if a cause of action is stated against any defendant; and a joint demurrer by the holder of a permit and his sureties on a statutory bond will be overruled if a cause of action is stated against such holder, though none is stated against the sureties.

<sup>1</sup> Reported in 150 N. W. 912.

Action in the district court for Ramsey county to recover \$16,-438.42 for illegal cutting of timber under a logging permit. Defendants demurred to the complaint. From an order, Kelly, J., overruling their demurrer, defendants appealed. Affirmed.

*J. N. Searles and R. J. Powell*, for appellants.

*Lyndon A. Smith*, Attorney General, and *John C. Nethaway*, Assistant Attorney General, for respondent.

DIBELL, C.

The complaint alleges that in 1903 the defendant Brooks-Scanlon Lumber Co. received from the state a permit to cut "all the pine timber not less than eight inches in diameter twenty-four feet from the ground" on a school section in St. Louis county; that the defendants William O'Brien and F. W. Bonness were sureties upon the statutory bond of the company; and that in cutting the timber specified in the permit the company cut 792,782 feet from the same land, of a size less than the specified size, for which treble damages in the sum of \$16,438.42 are demanded. The cutting was completed as early as May, 1905. In *State v. Brooks-Scanlon Lumber Co.* 122 Minn. 400, 142 N. W. 717, is reported the result of the litigation as to the timber properly cut under this permit. The defendants join in a demurrer. The demurrer was overruled and they jointly appeal.

There are involved the questions whether the action is in trespass or on contract, for if on contract it is barred by the statute of limitations; whether, if in trespass, the act of 1905 removes the bar of the statute; whether such act is constitutional; and what the effect of the joint demurrer is.

1. The complaint contains mingled allegations of a breach of a contract and of the commission of a trespass, as if it were thought to state a cause of action in contract to charge the sureties and a cause of action in trespass to avoid the bar of the statute. This unnecessary confusion is easily removed.

By Laws 1895, p. 352, c. 163, § 7 (R. L. 1905, § 2442), it is provided that whoever without a valid permit cuts timber from state lands "shall be liable in an action brought by the state in treble dam-

ages, if such trespass is adjudged to have been wilful; but in double damages, only, if such trespass is adjudged to have been casual and involuntary."

The complaint alleges that the lumber company, in violation of its permit and while cutting the timber covered by it, cut and removed 792,782 feet of timber of less size than specified in the permit. Originally the complaint used the words "wrongfully, knowingly and wilfully." These words were stricken on motion of the defendants. Without them the facts stated constitute a trespass. The only rightful cutting is with a permit. Without a permit the cutting is wrongful.

The lumber company was rightfully in possession of the school land, for the purpose of cutting the timber covered by its permit, when it cut the timber for which suit is now brought. In cutting the timber not included in the permit it was a trespasser. *Everett v. Gores*, 89 Wis. 421, 62 N. W. 82; *Disbrow v. Westchester Hardwood Co.* 17 App. Div. 610, 45 N. Y. Supp. 376; *Shiffer v. Broadhead*, 126 Pa. St. 260, 17 Atl. 592.

There is justification for holding the complaint to intend an action on contract, in view of its repeated allegations of a contract and its violation, and to hold the state to such theory; but we adopt the view of the trial court that the complaint is sustainable as one in trespass notwithstanding its inconsistent positions.

2. By Laws 1905, p. 273, c. 204, § 43 (G. S. 1913, § 5302), it is provided as follows:

"The statutes of this state limiting the time for bringing either civil or criminal actions shall not apply to any action brought by the state for trespass upon any of its lands, or to any criminal prosecution instituted under this chapter, and any civil action brought under this chapter may, at the election of the attorney general, be brought in any county in this state."

This statute applies to such a taking of timber as is here involved. It was enacted before the decision in *State v. Buckman*, 95 Minn. 272, 104 N. W. 240, 289, holding that the statute gave a penalty, and that the three years' statute of limitation applied, but after the holding of the trial court which the supreme court affirmed. Its evident

purpose was to render inapplicable the three years' limitation statute and to remove all limitation. It was not intended that its application should be limited to future trespasses.

3. The title of the act is as follows:

"An act relating to the sale of timber on state lands, defining trespass thereon and prescribing penalties therefor."

It is the contention of the defendants that this act is unconstitutional because violative of art. 4, § 27, of the Constitution which provides that "no law shall embrace more than one subject, which shall be expressed in its title."

We do not sustain this contention. The act treats of the general subject matter included in Laws 1895, p. 352, c. 163 (R. L. 1905, § 2442), relative to state lands and their products, and repeals all inconsistent acts or parts of acts. In the constitutional sense there is but one subject. The provision for a limitation is germane to the subject—something proper to be included in the statute and not foreign to its title. The title is not restrictive within the meaning of the cases. It is not a cloak for inappropriate legislation. It is held sufficient. *State v. Shevlin-Carpenter Co.* 99 Minn. 158, 108 N. W. 935, 9 Ann. Cas. 634; *State v. Board of Co. Commrs. of Renville County*, 83 Minn. 65, 85 N. W. 830; *City of Crookston v. Board of Co. Commrs. of Polk County*, 79 Minn. 283, 82 N. W. 586, 79 Am. St. 453; *State v. Sharp*, 121 Minn. 381, 141 N. W. 526; *State v. Erickson*, 125 Minn. 238, 146 N. W. 364.

4. A joint demurrer cannot be sustained if the complaint is good as against one of the demurring defendants. *Dunnell*, Minn. Pl. (2d ed.) § 275, and cases cited. The complaint was insufficient as against O'Brien and Bonness. If it intended to state a cause of action against them on contract it failed. Even if there had been a cause of action on contract it was long ago barred. Construed as an action in trespass it stated no cause of action against them. It stated a cause of action against the lumber company for a trespass and is good as against a joint demurrer.

We have endeavored to decide every point raised by the demurrer so that the parties may now try their controversy without useless uncertainty as to the law applicable.

Order affirmed.

HARVEY MEYER v. JULIUS SATERBAK.<sup>1</sup>

January 29, 1915.

Nos. 18,987—(195).

**Variance — action for services.**

1. Where a complaint declares upon a *quantum meruit* count for the reasonable value of services, and the evidence discloses that defendant agreed to pay a specified price therefor, this is at most a variance, and, when it appears that defendant was not misled thereby to his prejudice, a recovery of the agreed price is proper.

**Verdict.**

2. The verdict is sustained by the evidence.

**Charge to jury.**

3. There was no prejudicial error in the charge.

Action in justice court to recover \$57.60 for work and labor. From an order dismissing the action, plaintiff appealed to the district court for Traverse county. The appeal was heard by Flaherty, J., and a jury which returned a verdict in favor of plaintiff for \$60.23. From an order denying his motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*V. E. Anderson*, for appellant.

*Edward Rustad*, for respondent.

BUNN, J.

This is an action to recover \$57.60 claimed to be due plaintiff from defendant for labor performed. The complaint alleged in general terms that "plaintiff performed work, labor and services for the defendant at his special instance and request, reasonably worth and of the value of \$70, which sum the defendant agreed to pay therefor." The answer alleged a contract of hiring by which plaintiff agreed to work for defendant for a period of four months at an agreed compensation of \$120 for the entire period, and that plaintiff quit

<sup>1</sup> Reported in 150 N. W. 901.

the employment long before the expiration of the period in violation of his agreement. At the trial, on motion of defendant, plaintiff was required to elect "whether he will claim under an express contract as to the amount of wages \* \* \* or whether he is to claim reasonable wages for the time of his services." Plaintiff elected to claim "reasonable wages for the time that he worked for the defendant." The trial then proceeded and resulted in a verdict in favor of plaintiff for the amount claimed. Defendant appealed from an order denying its motion for judgment notwithstanding the verdict or for a new trial.

Defendant's claims may be thus summarized: (1) Plaintiff was bound by his election to rely on proof of reasonable value, and therefore cannot recover on evidence showing an agreed price; (2) the evidence proved an entire contract, and that plaintiff did not perform; (3) errors in the charge.

As to the first contention, the evidence of plaintiff on his direct examination tended to support the theory of *quantum meruit*, while on cross-examination he stated that it was agreed that he should work for defendant for \$30 per month.

The complaint was upon both implied and express contract. Proof of either was admissible so long as both allegations stood. *Kinzel v. Boston & Duluth Farm Land Co.* 124 Minn. 416, 145 N. W. 124; *Lufkin v. Harvey*, 125 Minn. 458, 147 N. W. 444. It is not plain how this double form of pleading imposed any unfair burden on defendant in this case, and we doubt if the court properly required plaintiff to elect. *Theodore Wetmore & Co. v. Thurman*, 121 Minn. 352, 141 N. W. 481. But this question is not before us, as plaintiff recovered notwithstanding the election.

The case must therefore be treated as if the complaint had declared upon *quantum meruit* alone. The question is whether, under such a complaint, a recovery may be had when the proof shows an express contract for the same compensation that is alleged to be the reasonable value.

The point is purely technical, but there is some foundation in our past decisions for the rule that, where a complaint declares upon a *quantum meruit* count, proof of an express contract will not support

a recovery, and *vice versa*. Gaar, Scott & Co. v. Fritz, 60 Minn. 346, 62 N. W. 391; Ecker v. Isaacs, 98 Minn. 146, 107 N. W. 1053. See also Kappa v. Levstik, 123 Minn. 532, 144 N. W. 137. It is a proper time, we think, to clear up any confusion arising from these and other prior decisions bearing on the point. As stated by Dunnell in his work on Minnesota Pleading, § 911: It is the rule "in New York and most code states [that] plaintiff may introduce an express contract under a *quantum meruit* count. The only effect of proving an express contract fixing the price is that the stipulated price becomes the *quantum meruit*." We regard this as the sensible and correct rule. Where the defendant is in no way misled to his prejudice, the variance, for it is nothing more, should be treated as immaterial and disregarded. Dunnell, Minn. Pl. § 913, and cases cited. To deny a recovery because the evidence shows an express agreement for the same compensation claimed to be the reasonable value, seems an absurdity, and we unhesitatingly say that this is no longer the law in this state, if it ever has been. We adopt the rule that, under a complaint declaring on a *quantum meruit* count, plaintiff may prove and recover on an express contract, unless the variance in the particular case misleads defendant to his prejudice.

Whether the contract was as claimed by plaintiff, a hiring at \$30 per month with the right to quit whenever his wife should leave defendant's employ, or whether it was, as claimed by defendant, an entire contract for three months' services, was a fair question for the jury. The evidence was in direct conflict, and we cannot disturb the verdict after the trial court has approved it.

We find no reversible error in the charge. The main criticisms thereof are covered by what we have said as to the right of plaintiff to recover on an express contract notwithstanding that he elected to proceed on a *quantum meruit*. Defendant was in no way misled by the variance, and in no way prejudiced by the instructions.

Order affirmed.

PIONEER LOAN & LAND COMPANY v. JOSEPH L.  
COWDEN and Another.<sup>1</sup>

January 29, 1915.

Nos. 18,992—(210).

**Contract of sale—possession—construction of contract.**

1. Land under lease was sold in May under an executory written contract of sale. The contract by its terms gave possession to the vendee "by assignment of lease." *Held*, the contract gave the vendee the right to the crop for that year, and parol evidence was not admissible to show an agreement that the vendor should have the crop.

**Same—registry tax.**

2. Where such a contract is pleaded in the complaint and admitted in the answer, it is not material in determining the rights of the parties between themselves whether or not the registry tax has been paid.

**Cropping contract—action against vendor—measure of recovery.**

3. The lease provided that the owner of the land should receive one-quarter of the crop and should give the tenant three-quarters, that the owner should pay one-quarter of the threshing bill and on November 1 pay 75 cents an acre for plowing all land in crop during that year. By a later agreement the owner agreed to pay for breaking land put into crop. After the sale, the vendor received the proceeds of the crop and paid all these charges. *Held*, the vendee, in this action to compel him to account, is entitled to recover only the net amount received after deducting such payments.

**Pleading—answer.**

4. The right to these deductions is properly pleaded.

**Reduction of judgment or new trial.**

5. New trial granted, unless defendants consent to judgment against them for the amount found by the trial court less deduction for such payments.

Action in the district court for Marshall county to recover \$317.82 for conversion of certain crops and for an accounting. Defendants' demurrer to the complaint was overruled. The case was tried before Grindeland, J., who made findings and ordered judgment in favor

<sup>1</sup> Reported in 150 N. W. 903.

of plaintiff for \$272.78. From an order denying their motion for a new trial, defendants appealed. Affirmed on condition.

*A. N. Eckstrom*, for appellants.

*Julius J. Olson*, for respondent.

HALLAM, J.

On May 14, 1912, defendant Joseph L. Cowden was the owner of a half section of land in Polk county, Minnesota. On that day defendants, husband and wife, entered into an executory written contract to sell the land to plaintiff. A small amount was paid down, the balance to be paid in annual instalments. The land was then in possession of a tenant under a written lease. The lease provided that the owner should receive one-quarter of the crop; that he should give the tenant three-quarters thereof; that he should pay one-quarter of the threshing bill, and that on November 1 of each year he should pay the tenant 75 cents per acre for plowing all land in crop during that year. By a verbal agreement made after the lease, but before the sale, the tenant agreed to break during 1912 twenty-five acres and plant it to flax, and defendants agreed to pay \$2.50 an acre for the breaking. At the time the contract of sale was made, 160 acres had been plowed and planted in wheat and barley. The breaking for flax and the sowing of this crop was done later. By the terms of the contract of sale, defendant gave possession of the land to plaintiff upon the signing of the contract, "by assignment of lease."

This controversy is over the right to the 1912 crop and the liability for the plowing which produced it. Defendants claimed the owners' share of the crop, and they took it and marketed it, received the proceeds amounting to \$301, and paid for the plowing, breaking and threshing. Plaintiff claims the right to receive the crop without any obligation to pay for plowing or breaking, and it brings this action, demanding an accounting of moneys collected and for judgment for the gross amount received by defendants. The court gave plaintiff judgment for the amount received for the crop, after deducting the amount paid for threshing, but did not deduct the amount paid for plowing or breaking. Defendants appeal.

Defendants contend the court erred in receiving the contract of

sale in evidence. The registration tax had not been paid. The court permitted plaintiff to pay the tax during the trial and then received it in evidence. It was not necessary for plaintiff to prove the contract. Plaintiff pleaded the contract and defendant admitted it. Both parties predicate rights upon it. The admission of the contract in evidence added nothing to what was already admitted of record in the case, and it is not important whether it was competent evidence or not.

Defendant offered testimony to prove a verbal understanding that he was to receive the 1912 crop. This evidence was not competent. The contract in terms gave possession to plaintiff "by assignment of lease." This language operated to assign the lease to plaintiff and to deliver possession of the land subject to it. This gave to plaintiff the right to the 1912 crop. The language was not ambiguous. The court properly held that it could not be varied by parol. Defendants asked the court to find that plaintiff misrepresented the meaning of this language. The court declined to so find. The testimony is in conflict. Even if this defense can be considered a proper one, the court was amply justified in its refusal to hold that any such defense was proven. Neither is there any evidence of practical construction of the contract by the parties.

Plaintiff was entitled to the 1912 crop and defendant must account for the amount received therefor, less any proper deductions. The court deducted the amount paid by defendant for the owner's share of the threshing, and the propriety of this is conceded. We are of the opinion that it should also have deducted the amount paid by him for plowing and breaking. After assignment of the lease and delivery of possession of the premises to plaintiff subject to the lease, plaintiff became substituted for defendant as landlord. The price of the plowing had not yet become due. The breaking had not been done. The amount to be paid for plowing and breaking was in reality a deduction from the gross return the landowner was to receive from his land. We cannot distinguish it on principle from the amount to be paid for threshing. One was for producing the crop, the other for garnering it in, but the principle in each case was the same.

It makes little difference to the result whether this so-called lease was a lease in fact or a mere cropping contract. If it was a lease, then any covenant to pay rent would run with the land, and any covenant providing for a deduction from the rent would likewise run with the land, and an assignee of the reversion and of the lease would take subject to the burden of such covenant. 1 Tiffany, Landlord & Tenant, § 149 (2); Baylye v. Hughes, Cro. Car. 137; and Trask v. Graham, 47 Minn. 571, 50 N. W. 917. If the so-called lease be considered merely as a personal contract creating no interest in the land, the result would be the same. Having taken an assignment of it, the plaintiff could not take over its benefits without its burdens. The assignment of an executory contract by one party to it does not relieve the assignor of his personal liability to the other contracting party, nor does it create a personal liability on the part of the assignee, without provision to that effect. But the assignee may not enforce the contract against the other contracting party until the obligations which the contract imposes have been performed by some one. He takes his assignment incumbered by all the burdens to which it was subject in the hands of the assignor. 2 Ruling Case Law, 626; Smith v. Rogers, 14 Ind. 224; Union P. R. Co. v. Douglas County Bank, 42 Neb. 469, 60 N. W. 886; Atlantic & N. C. R. Co. v. Atlantic & N. C. Co. 147 N. C. 363, 61 S. E. 185, 23 L.R.A.(N.S.) 223, 125 Am. St. 550, 15 Ann. Cas. 363; Rockwell v. Edgcomb, 72 Wash. 694, 131 Pac. 191, 45 L.R.A.(N.S.) 661. As between him and his assignor the assignment likewise passes the benefits subject to the burdens, and unless he has so stipulated he cannot require the assignor to continue to bear the burdens of the contract while he enjoys the benefits. Plaintiff was entitled to the net return from the land. Had defendant not interfered, plaintiff would have received the owner's share of the crop, but it would then have been obliged to pay for the plowing, breaking and threshing. It is in no better situation now.

The point is made that these items could not properly be deducted, because not pleaded as an off-set or counterclaim. To this we do not agree. The complaint demands an accounting of moneys collected by defendant belonging to plaintiff. Defendant in his answer

accounts for all moneys received on account of the 1912 crop, and alleges that he was compelled to pay these amounts in producing it and getting it to market. The evidence in regard to these items was received without objection and is properly before the court.

A new trial may be avoided if defendants will consent to judgment against them for the amount ordered by the court, less deductions for plowing and breaking which amount to \$182.50. Upon their filing such consent with the clerk of the district court within 20 days after filing of remittitur, the motion for a new trial will be denied; otherwise, granted.

---

H. W. JOHNS-MANVILLE COMPANY v. GREAT  
NORTHERN HOTEL COMPANY.<sup>1</sup>

January 29, 1915.

Nos. 19,001—(222).

**Relief from default—discretion of court.**

1. An order of the trial court refusing to relieve defendant from its failure to appear at the time set for the trial of the action, *held* not an abuse of discretion.

**Verdict sustained by evidence.**

2. No errors were committed on the trial, had in the absence of defendant, and the evidence supports the verdict.

Action in the district court for Hennepin county to recover \$379.80 for labor and material. The case was tried before Leary, J., who directed a verdict in favor of plaintiff for \$395.27. From an order denying defendant's motion to vacate the verdict and to grant a new trial, it appealed. Affirmed.

*Jay W. Crane*, for appellant.

*L. L. Schwartz*, for respondent.

<sup>1</sup> Reported in 150 N. W. 907.

BROWN, C. J.

This action was brought to recover the agreed value of certain work and material performed and furnished defendant in the construction of a roof to its hotel building, located at Breckenridge. The agreed value of the work and material was the sum of \$379.80. The complaint set out these facts. In addition to a general denial defendant pleaded a counterclaim for damages for a breach of the contract, setting up that the work was not performed within the time prescribed, and was defective in the respects set forth in the answer. Defendant alleged in connection with this counterclaim that the agreed price of the work was \$379.80, the amount stated in this complaint, but claimed the sum of \$500 damages for the alleged breach of the contract. The reply put in issue the allegations of the answer by a general denial. The cause was set for trial on May 11, 1914. Defendant failed to appear, plaintiff offered in evidence the contract between the parties, called a witness who testified to the performance of the same, whereupon the court directed a verdict in plaintiff's favor for the amount claimed, with interest. Defendant thereafter moved upon the record and certain affidavits for a new trial on the grounds, among others, of surprise and excusable neglect on defendant's part in failing to appear at the trial, and that the verdict was not sustained by the evidence. The motion was denied and defendant appealed.

The questions presented do not require extended mention. We find evidence in the record, considered in the light of the issues made by the pleadings, amply sufficient to support plaintiff's right to recover, and there was no error in directing the jury to find accordingly. The fact that no order was made by the court in reference to defendant's counterclaim is not important. Defendant was not present at the trial and must be deemed to have abandoned the same. The only question requiring mention is whether the trial court abused its discretion in refusing to relieve defendant of its default and failure to appear at the trial. We discover no reason for so characterizing the action of the court. It appears that the cause was reached for trial early in May, but defendant was not ready to proceed. It was then set down for trial, at the

instance of the parties, on May 11, with the understanding that the cause would be disposed of on that day, unless previously settled. The court had experienced some difficulty in proceeding with its work by the fact that counsel were not prepared, and when this cause was reached on the eleventh, the court, though informed that defendant's counsel could not be present, ordered the trial to proceed, with the result already stated. The affidavit of counsel for defendant presented in support of the motion for relief stated that he informed the attorney for plaintiff on the evening of the tenth of May, the day preceding the date set for the trial, that he had been called out of town on important matters and could not be present at the trial, and that the attorney for plaintiff agreed to a postponement of the trial until the following day, or May 12. The attorney for plaintiff made affidavit admitting that defendant's attorney informed him on the tenth, that he could not appear for the trial on the eleventh, but denied that he agreed to postpone the trial until the twelfth. The court necessarily, by the denial of the motion, found that there was no agreement to further postpone the trial, and there was therefore no bad faith on the part of plaintiff's attorney in proceeding with the trial as directed by the court on the eleventh. Nor can it be said that the court abused its discretion in not granting relief from the default. The whole matter is tersely summed up by the trial judge as follows:

"As the court remembers this case, it had been with some difficulty that the court had been successful in securing cases to be tried, although the calendar was some six or eight months behind. On the day prior to the day upon which this case was tried the court was without anything to do and called upon counsel in this matter to try their case and, as I remember the circumstances, the court was then told by counsel on both sides that if the case were permitted to go over, that it would be either tried or settled on the next trial morning. The next trial morning the defendant's attorney did not appear, but counsel for plaintiff did, together with his witnesses, and the court ordered the trial to proceed."

If counsel for defendant had a previous engagement in some other court, which prevented him from appearing at the time set

for this trial, the fact should have been communicated to the court by proper affidavit. This was not done and the court properly treated defendant's absence as wholly voluntary.

Order affirmed.

---

STATE ex rel. LYNDON A. SMITH v. DULUTH STREET  
RAILWAY COMPANY.<sup>1</sup>

January 29, 1915.

No. 19,095—(20).

**Street railway—franchise—condition unfulfilled.**

1. The Duluth Street Railway Co. did not construct, equip and have in operation one mile of its street railway within one year after the granting of its franchise, in accordance with the condition expressed in it.

**Same—forfeiture of franchise.**

2. The franchise granted to the Duluth Street Railway Co. (Sp. Laws [Ex. Sess.] 1881, c. 200, approved November 17, 1881) was upon the express condition that if it failed to construct, equip and have in operation one mile of street railway within one year it should, without any act on the part of the state or the village of Duluth, forfeit to the village all of the rights, privileges and immunities granted. It was provided that the grant, when accepted, should be a contract between the state and the village and the company. It is *held* that the forfeiture was not executed *ipso facto* upon a failure to perform the condition strictly on time, so that there could be no waiver of the strict performance of the condition, or of a forfeiture, but that the condition was in the nature of a condition subsequent subject to waiver.

**Waiver of performance.**

3. The village waived strict performance of the condition.

**Construction of franchise.**

4. The act of 1881 constitutes a valid franchise, exclusive in character, in

<sup>1</sup> Reported in 150 N. W. 917.

the Duluth Street Railway Co., and such franchise expires on October 17, 1931.

Upon the relation of Lyndon A. Smith, Attorney General, the district court for St. Louis county granted its writ of *quo warranto* directing the Duluth Street Railway Co. to show by what warrant it assumed to exercise any right, privilege, immunity or franchise under or by virtue of the legislative act of 1881 (Ex. Sess.) c. 200. The respondent answered and alleged that, by resolutions and ordinances and actions brought, the village of Duluth, the city of Duluth and the state of Minnesota repeatedly and in various ways asserted the continued existence and validity of respondent's franchise and enforced its provisions against respondent by requiring it to expend large sums of money thereunder in the construction of new lines and extensions. The matter was heard by Cant, J., who dismissed the writ. From the order denying its motion for a new trial, and from the judgment entered pursuant to the order for judgment, plaintiff appealed. Judgment and order affirmed.

*Lyndon A. Smith, Attorney General, John C. Nethaway, Assistant Attorney General, Francis W. Sullivan, Davis, Kellogg & Severance and Harvey S. Clapp, for appellant.*

*Washburn, Bailey & Mitchell, N. M. Thygeson, Henry F. Greene and Thomas S. Wood, for respondent.*

DIBELL, C.

*Quo warranto* on the relation of the attorney general questioning the right of the respondent, Duluth Street Railway Co., to occupy the streets of Duluth. There was judgment for the respondent. The state appeals from the order denying its motion for a new trial and from the judgment.

The street railway company claims the right to occupy the streets of Duluth by the grant contained in Sp. Laws 1881, (Ex. Sess.) p. 212, c. 200, approved November 17, 1881.

Section 1 grants to the Duluth Street Railway Co. "during the term of its charter, the exclusive right and privilege of constructing

and operating a single or double track for a passenger railway line," etc., in the streets of the village and its suburbs.

Section 2 is as follows:

"The aforesaid grant is upon the express condition that if the said Duluth Street Railway Company shall fail to construct, equip and have in full operation one mile of said street railway within one year after the passage of this act, then and in that case the said Duluth Street Railway Company shall, without any act on the part of the state or the village of Duluth, forfeit to the village of Duluth all of the rights, privileges and immunities granted by this act, and is upon the further express condition, that said company shall build and operate a line connecting Rice's point with the central parts of said village, as soon as there shall be an improved street available for that purpose."

Section 3 provides that, under certain conditions, the village council may designate extensions or new lines, and if not constructed by the company it may grant an exclusive franchise to another company; and if the company neglects to keep a line in operation the council may grant an exclusive franchise to another company to build and operate on such line.

Section 16 provides that upon the company signing and filing an acceptance of the grant with the secretary of state and the village recorder the same shall operate as a contract between the state and the village and the company.

On November 8, 1881, prior to the grant of the franchise, the people had voted upon and adopted an amendment prohibiting the granting of such a franchise by special act. Const. art. 4, § 33. This amendment did not become a part of the Constitution until the January following. *City of Duluth v. Duluth St. Ry. Co.* 60 Minn. 178, 62 N. W. 267. At the time fixed for the performance of the condition of the grant the legislature was without authority to grant a franchise.

On December 5, 1881, the Duluth Street Railway Co. filed with the recorder of the village, and on December 8, with the secretary

of state, its written acceptance in accordance with the provisions of section 16.

The village of Duluth was created by Sp. Laws 1881, p. 49, c. 11, approved March 8, 1881. The authority delegated to it to grant rights in its streets for street railway purposes is as follows:

"To authorize, control and grant the power to construct street railways in the streets and avenues of said village by any private company or companies, and to control and direct the operation of the same by contract or ordinance."

At the time of the forfeiture claimed the village, by virtue of this charter provision, could grant a franchise. It could not grant an exclusive franchise such as the 1881 statute granted. *Long v. City of Duluth*, 49 Minn. 280, 51 N. W. 913, 32 Am. St. 547; *Detroit Citizens' Street Ry. Co. v. Detroit Ry. Co.* 171 U. S. 48, 18 Sup. Ct. 732, 43 L. ed. 67. And it may be conceded that it could not, under its charter, bind itself to a provision for fares such as was embodied in the 1881 franchise.

By Sp. Laws 1883, p. 219, c. 80, § 3, approved March 5, 1883, the village charter was amended and the provision above quoted was omitted.

The Duluth Street Railway Co. was incorporated under the general laws on October 17, 1881. The period of its corporate existence was fixed at 50 years from that date. By an amendment of its articles adopted on March 18, 1910, the period of its corporate existence was extended to 50 years from July 1, 1908.

The state does not attack the general franchise of the company—that is, its right to be a corporation and to exercise corporate powers. It attacks its right to use the streets of Duluth under the special grant of 1881; and the proceeding resolves itself into an inquiry into the validity of this grant.

In a general way the questions are these:

(1) Did the company perform the condition contained in its

grant to the effect that it should construct, equip and have in operation one mile of its street railway within one year from the date of the grant?

(2) If it did not, was the forfeiture at once executed so that all rights were at an end, with no power in the village to waive strict performance or the right to claim a forfeiture?

(3) If the village had the power to waive, did its acts constitute a waiver?

(4) What right, if any, has the company by virtue of its grant?

The second is the fundamental question. The others are proper to a complete statement of the case.

1. The court finds that the railway company constructed one mile of track prior to November 18, 1882. The evidence justifies the finding. It was a shabby affair, but it was a track, and it was a mile long. It had been built in haste, commenced not very long before it was finished, and was relaid before practical use was made of it.

The court finds that the railway company "wholly failed to equip the said line of railway or to have the same in operation before said last-mentioned date, nor was said line fully equipped or in operation at any time prior to the sixth day of July, 1883."

This conclusively appears. At the date stated it was complete, and ever since it has been in operation. The condition was not performed within the time specified in the grant.

2. The vital question is whether upon the failure to perform the condition prior to November 18, 1882, the forfeiture was at once executed with no power resting in the village to waive performance at the precise moment specified or to condone a forfeiture.

The state reaches the heart of the controversy when it rests its claim upon the proposition that the forfeiture clause in the franchise was self-executing; that there being a failure to build and operate within the time fixed by the grant, the franchise was at an

end; that there could be no waiver of a failure to operate on strict time; and that the street railway company could get rights in the street afterwards only by a new grant.

That a statute may create a self-executing forfeiture so that upon the failure to perform the condition upon which it depends all right ends is without question. Thus in *Wilmington City Ry. Co. v. Wilmington & B. S. Ry. Co.* 8 Del. Ch. 468, 46 Atl. 12, the court says:

"The reason why a forfeiture created by a statute is self-executing, while one raised by the common law is not, is that the legislature said so, and intends so."

Cases are cited almost without end, some resembling the one before us, others drawn from more or less useful analogies of the law. Many of them are cited and find comment in *Booth, Street Railways*, §§ 46, 47; *Joyce, Franchises*, § 486; 4 *McQuillin, Municipal Corporations*, §§ 1665-1668; and 1 *Nellis, Street Railroads*, § 17.

A review of them would not be useful. We have examined them. The question is one of legislative intent. All of the cases make it so. If it was the intention of the legislature that on November 17, 1882, the street railway not then being completed and in operation, all rights under the grant should cease, and there should reside in the village no power of waiving strict performance, such intent must be given effect. If that was the intent the village or city could not estop or otherwise bind itself to a franchise such as was granted by the 1881 act, for it had no power to grant such a franchise. It could not by estoppel bind itself to a franchise different from one it might grant under its charter. This is the effect of the holding in *State v. Des Moines City Ry. Co.* 159 Iowa, 259, 140 N. W. 437.

At the time of the grant of the franchise the legislature knew that when the time fixed for the performance of the condition came it would be without authority to make a further grant because of the constitutional amendment mentioned. Section 16 made the franchise a contract between the state and the village and the company upon

the company's acceptance. The forfeiture was made to the village. The village could give no such franchise. It was the purpose of the state and the village to get a street railway built and operated by the respondent. It was the purpose to put the street railway under the regulation of the village. So much was this so that it was given power to require extensions and if need be grant exclusive franchises to other companies. In our judgment it was not the legislative intent that upon a failure to build on time the forfeiture should be *ipso facto* executed, of necessity, though the village preferred to waive the forfeiture, and did everything it could to avoid taking advantage of it. Whether Duluth should have a street railway, and if so upon what terms, was largely of local concern, though the right to use the streets for street railway purposes of necessity came directly or indirectly from the legislature. The condition was, in our opinion, in the nature of a condition subsequent, the strict performance of which could be waived. This was the view taken by the trial court. No case cited is in its facts precisely like the one before us. The cases furnish arguments some for and some against the conclusion reached. More than 30 years have passed since the franchise was granted. We have not attached great importance to a long-continued practical construction; but the fact that for long the construction which we adopt has been generally accepted and acted upon by the public and the company and by those interested adversely to the company is reassuring of its correctness.

3. If the village could waive strict performance the evidence leaves no question but that it did. On December 22, 1882, the common council, reserving to itself the right to except to the manner in which the tracks were laid and to the kind of rails used, consented by formal resolution that the company postpone the actual operation of its railway until May 15, 1883; and on May 1, 1883, it formally consented by resolution that the operation of the road be delayed until 30 days after the acceptance of a certain street improvement; and the railway was in operation within the time fixed by this last resolution. Upon its completion cars commenced running and they

have run ever since. The village and its successor, the city, accepted the completed road and treated the grant of 1881 as the franchise under which it operated.

4. The grant to the company was "during the term of its charter." The company was incorporated on October 17, 1881. The court found that its franchise expired on October 17, 1931. Since its incorporation its corporate existence has been extended by the amendment of its articles to 50 years from July 1, 1908. The amendment did not result in an extension of the franchise. The street railway company has a valid franchise, granted by the act of 1881, exclusive in character, the provisions of which are subject to construction as occasion arises, and such franchise is at an end on October 17, 1931.

Judgment and order affirmed.

---

MINNEAPOLIS, ST. PAUL, ROCHESTER & DUBUQUE  
ELECTRIC TRACTION COMPANY v. EDWARD E.  
GRIMES.<sup>1</sup>

Nos. 19,113—(294).

January 5, 1915.

**Appealable order.**

An order amending a judgment, based on a motion made after the entry and satisfaction of the judgment, affects the substantial rights of the parties and is appealable under G. S. 1913, § 8001, subd. 7. [Reporter.]

January 29, 1915.

**Eminent domain—appeal from award—amendment of judgment.**

In proceedings to condemn a railroad right of way the commissioners awarded to the landowner a specific sum of money as damages, and in addition thereto imposed upon the company the obligation to construct a cattle pass and certain culverts for the use of the landowner. The company appealed, and by the notice thereof limited the issues raised thereby

<sup>1</sup> Reported in 150 N. W. 180, 906.  
128 M.—21.

to the question of damages. The jury in the district court reduced the damages from the amount awarded by the commissioners, but the verdict contained no reference to the conditions imposed by the report of the commissioners. The company caused judgment to be entered upon the verdict, and the judgment made no reference to the conditions. The amount thereby awarded to the landowner was paid and he formally satisfied the judgment. It is *held*:

(1) That the award of the commissioners imposing the conditions referred to was not nullified by the appeal, and, since that branch of the proceeding was not challenged on the trial of the appeal, the conditions remained in force and effect.

(2) The court properly corrected and amended the judgment by incorporating this provision of the commissioners' report, notwithstanding the fact that judgment as to damages had been paid and discharged.

Proceedings in the district court for Dakota county to condemn a right of way for defendant's road. The facts are stated in the opinion. From an order amending the judgment, Johnson, J., defendant appealed. Affirmed.

*M. H. Boutelle* and *R. T. Boardman*, for appellant.

*George S. Grimes* and *Gordon Grimes*, for respondent.

A motion to dismiss the appeal having been made the following opinion was filed on January 5, 1915.

PER CURIAM.

An order modifying a judgment based upon a motion made subsequent to the entry of the judgment, and after the judgment has been satisfied of record, is one affecting the substantial rights of the parties, and is appealable under subdivision 7, § 8001, G. S. 1913.

Motion to dismiss appeal denied.

The following opinion was filed on January 29, 1915.

BROWN, C. J.

This proceeding was instituted by appellant traction company for the condemnation of certain land for right of way purposes. Commissioners were duly appointed and in and by their report respondent's damages were assessed at the sum of \$3,250; in addition to which the commissioners imposed as a condition to the right of way granted that the company construct a cattle pass under the

railroad track, and certain crossings and culverts for the use of respondent. The company appealed from the award, assigning as grounds thereof that the damages were excessive, making no specific reference to the conditions imposed by the report. The damages were reduced by the jury in the district court to the sum of \$2,500, and the conditions were not referred to in the verdict. In fact the question of the reasonableness of the conditions was not litigated on the trial in the district court. In the memorandum attached to the order appealed from the trial court so states the fact. The verdict was returned on November 22, 1913. Thereafter, on May 9, 1914, the company caused judgment to be entered on the verdict, for the amount thereof with costs, and the same was paid on that day to the attorney for respondent, who in turn executed a formal satisfaction of the judgment which was filed with the clerk of the district court. The judgment contained none of the conditions imposed by the commissioners, but was for the recovery of the damages only. Counsel for respondent discovered this omission on June 16, 1914, and promptly moved the court to correct the same by including therein the conditions so imposed. After hearing the parties by their respective attorneys the court made an order granting the motion. From which order the company prosecuted the present appeal.

The report of the commissioners embodied two distinct elements: (1) The conditions imposed, namely, the construction of the culvert and cattle pass; (2) the damages suffered by respondent. The appeal did not challenge the conditions, but the award of damages only. *Minneapolis, St. P. R. & D. Elec. T. Co. v. St. Martin*, 108 Minn. 494, 122 N. W. 452. Not having challenged the report of the commission as to such conditions they became final, and should have been incorporated in the judgment. Section 5409, G. S. 1913. They were not so incorporated and it clearly was within the power of the court to amend the judgment so that it would conform to what it should have been. 17 Am. & Eng. Enc. (2d ed.) 822, and authorities there cited. Since the conditions and damages were separate elements of the relief awarded by the commissioners it is not important that the damages have been paid and the judgment

satisfied in this respect. That the court has the inherent power to correct errors and mistakes of this kind is clear. 17 Am. & Eng. Enc. (2d ed.) 818-820. The contention of appellant that the question of the conditions, and the fact that they had not been complied with by the company, were matters considered by the jury in fixing the amount of damages is not sustained by the record. The trial court expressed a contrary opinion in the memorandum heretofore referred to, and the record contains no settled case purporting to present the evidence offered and received at the trial, from which the fact may be determined. In any event it does not appear that the company has in any manner been relieved from compliance with the conditions, and the court below correctly proceeded on the theory that compliance was necessary, in addition to the payment of the damages. It is clear that the appeal from the award, even if construed as including the cattle pass and culvert questions, did not *ipso facto* nullify the commissioners' report. On the contrary it remained in full force and effect until vacated by the district court after hearing on the appeal. The force and effect of this part of the report of the commissioners, so far as disclosed by the record, has not yet been called in question.

Order affirmed.

---

## ANNA PROKOSCH v. WILLIAM BRÜST and Others.<sup>1</sup>

February 5, 1915.

Nos. 18,972—(193).

### Guardian of incompetent.

1. In proceedings under the statute for the appointment of a guardian of the property interests of an alleged incompetent person, it is *held* that the findings of the trial court are sustained by the evidence.

### Character of proceeding — ascertainment of facts.

2. The proceeding is not adversary in nature, but rather one by the state

<sup>1</sup> Reported in 151 N. W. 130.

in its character of *parens patriæ*, and the manner and method of determining the facts rests in the sound discretion of the trial court, controlled, in a general way, by the rules of ordinary judicial procedure.

**Examination of the incompetent.**

3. The statutes providing for the cross-examination of an adverse party have no application to the proceeding, yet the court may require the alleged incompetent to submit to examination for the purpose of testing his or her mental condition.

**Evidence.**

4. The record presents no reversible error in rulings upon the admission or exclusion of evidence.

From an order of the probate court for Brown county appointing William Brust guardian of Anna Prokosch, an alleged incompetent, she appealed to the district court for that county. The matter was heard before Olsen, J., who made findings and affirmed the order of the probate court. From the judgment entered pursuant to the order for judgment, she appealed. Affirmed.

*Albert Hauser*, for appellant.

*Pfaender & Flor*, for respondents.

BROWN, C. J.

Proceedings for the appointment of a guardian for an alleged incompetent person. The appointment was ordered by the probate court, from which an appeal was taken to the district court. After trial and full hearing in that court findings of fact were made and the order of the probate court affirmed. A new trial was denied, and thereafter judgment was duly entered, in all things affirming the order of the probate court, from which judgment this appeal was taken.

The assignments of error present the questions: (1) Whether the evidence is sufficient to support the findings; (2) whether the findings justify the conclusion of incompetency; (3) whether the trial court erred in requiring the alleged incompetent to submit to cross-examination upon the question of her mental condition; (4) whether there was error in the admission of certain evidence.

1. The first two questions may be considered together. The al-

leged incompetent, Anna Prokosch, with her husband, a farmer, resided for many years in Brown county where, by industry and hard labor, they accumulated property which, at this time, is valued at over \$50,000; about \$10,000 of which is now represented by bank deposits and securities, the balance in farm land situated in that county. The husband died in December, 1912, and by his will left all and singular his property to his widow, and it was duly decreed to her by the probate court. She has since owned and controlled the same and received the rents and profits thereof for her own use and benefit. The farm land has been rented to tenants either for cash rent or a share of the crops, and since the death of her husband she has been assisted in the management of her affairs by her son. The petition for the appointment of a guardian of her property affairs was made by her daughters, all of mature years, and was opposed by Mrs. Prokosch and the son. Mrs. Prokosch is 74 years of age, and the evidence tends to show that she does not possess her former mental or physical vigor. Prior to his death the husband managed their affairs, and since that time Mrs. Prokosch has depended and relied upon her son, who was executor of the husband's last will and testament. Mrs. Prokosch can neither read nor write, and speaks the English language very imperfectly, and necessarily must have some one to guide her in her business matters. She admitted the necessity of this assistance when before the probate court. She recently gave away some money, the amount of which or to whom given she refused when on the witness stand to state, declaring that it was "nobody's business." A day or two before the trial the son paid over to her the sum of \$500, and this evidently escaped her memory for she denied receiving the same, though there was no question that she received it. She resented the effort to have a guardian appointed, because she believed that it was a scheme on the part of her daughters to get her property; she evidently not understanding that the sole purpose of the proceeding was the protection of her rights, and to preclude the possibility of any person wrongfully getting her property from her. The trial court found, after consideration of the evidence, and a personal observation of Mrs. Prokosch in court, and the facts and cir-

circumstances disclosed, that by reason of the imperfection of her mental faculties, and her inability to manage and care for her property, and property interests, the appointment of a guardian was necessary and proper. We think the findings bring the case within the statute, section 7433, G. S. 1913, and that they are sustained by sufficient competent evidence. This latter conclusion we reach with some hesitation. We are guided, however, by the fact that much must be left, in proceedings of this kind, to the sound judgment and discretion of the trial court. The advantageous position of that court, being confronted with the witnesses and the alleged incompetent, affords it an opportunity of more clearly understanding the situation, and the mental condition and capacity of the incompetent properly to manage his or her affairs, and considerable discretionary latitude must of necessity be granted to it in such cases. The probate court occupying the same position, with all the facts before it, held that a guardian was necessary. With the same conclusion by two courts, both afforded opportunities not presented to this court, we should interfere only upon a clear showing of error. This we do not find. We also hold that the findings of fact support the conclusions of law.

2. The alleged incompetent was personally before the court on the hearing below and, over the objection of her counsel, was called "for cross-examination under the statute," and fully interrogated by counsel for the petitioners touching various matters having a relation to her mental condition. It is insisted by her counsel that this was reversible error. In this contention we do not concur. In the determination of the question whether the appointment of a guardian of an alleged incompetent person is proper and necessary, the court is not controlled by the ordinary forms of procedure regulating the trial of actions at law. It is a special proceeding authorized by statute in response to the duty of the government in the protection of that class of citizens who are incapable of fully protecting themselves. *West Duluth Land Co. v. Kurtz*, 45 Minn. 380, 47 N. W. 1134. It is not adversary in nature, but rather one by the state in its character of *parens patriæ*, and the manner and method of determining the facts, when jurisdiction has once

vested in the court as required by law, rests in its sound judgment and discretion, controlled of course by the general rules of judicial procedure. 21 Cyc. 38; *Lawrence v. Thompson*, 84 Iowa, 362, 51 N. W. 11. The statute authorizing the calling of an adverse party for cross-examination in ordinary civil actions can have no application for, as stated, this is not an adversary proceeding, and there is no adverse party within the meaning of that statute; yet the right of the court to examine, on oath or otherwise, the alleged incompetent cannot well be questioned. The mental condition of the person and his ability to care for his property is the sole question involved, and no better test of such condition and ability can be found than by an examination of the person in such manner and to such extent as the court may deem proper. Such personal examination is uniformly had in analogous cases (*Woerner*, Am. Law of Guardianship, 400), and seems clearly appropriate in a proceeding where incompetency, not amounting to insanity, is charged. There was therefore no error in permitting the examination of Mrs. Prokosch, and the fact that the examination was treated as "cross-examination" is unimportant.

4. The last question urged does not require special discussion. We discover no error in the admission of evidence, and the assignments charging such error are not well founded.

5. While we sustain the order of the court we deem it proper to say, that in view of the situation and circumstances surrounding the parties immediately concerned, as disclosed by the record, the son, George Prokosch, should be named as guardian. While it is true that he declined an invitation from petitioners to accept the trust, his refusal appears to have been based on his opposition to the appointment of any guardian. And though no objection appears to the person in fact named to act in this capacity, it is clear that the interests of Mrs. Prokosch will be best served by naming the son, who since the death of the husband has been the counselor, guide and assistant of his mother in her property affairs. The cause will therefore be remanded without prejudice to an application to substitute the name of the son as guardian.

Order affirmed.

JOHN STASH v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>

February 5, 1915.

Nos. 18,979—(204).

**Injury to servant—evidence of negligence.**

1. Evidence *held* sufficient to sustain a finding that defendant was negligent in failing to furnish plaintiff, its servant, with a safe place in which to work, in that it did not cleat the lower end of a running board bridging an open space between a platform and a car and over which plaintiff was required to wheel a truck while unloading the car, whereby the board slipped as he was passing over it and he was injured.

**Damages.**

2. Verdict for \$7,000, reduced by the trial court to \$6,000, for injuries to plaintiff's knee, sustained as reduced.

Action in the district court for Ramsey county to recover \$26,702 for injuries received while in defendant's employ. The case was tried before Quinn, J., and a jury which returned a verdict in favor of plaintiff for \$7,000. Defendant's motion for judgment notwithstanding the verdict was denied. Its motion for a new trial was granted, unless plaintiff consented to a reduction of the verdict to \$6,000. From the order denying its motion for judgment, notwithstanding the verdict or for a new trial, it appealed. Affirmed.

*M. L. Countryman* and *A. L. Janes*, for appellant.

*O'Malley & O'Malley*, for respondent.

PHILIP E. BROWN, J.

This is an action to recover damages for personal injuries alleged to have been caused by defendant's negligence. Plaintiff had a verdict. Defendant appealed from an order denying its alternative motion.

Plaintiff suffered the injuries complained of while employed by

<sup>1</sup> Reported in 151 N. W. 124.

defendant as a trucker in its yards at St. Paul. His duties required him to remove freight with a truck from one car to and over an adjacent platform into other cars. At the time of the accident he was engaged in unloading a car, the floor of which was from 12 to 18 inches lower than the platform. Defendant had bridged the space, of some 15 to 18 inches, between the car and the platform with an iron running board, weighing between 80 and 90 pounds, about 40 inches long, 35 inches wide, and three-sixteenths of an inch thick, bent at one end. While plaintiff, on the third day of his employment, in the performance of his duties, was wheeling his empty truck from the platform into the car over the running board, the latter slipped out of place and fell to the ground, with him beneath it, fracturing his knee cap.

1. The only negligence charged or claimed was defendant's failure to furnish plaintiff a reasonably safe place in which to work, in that it did not cleat the lower end of the running board so as to prevent it from slipping or getting out of place. It is admitted that it was not cleated or otherwise secured except by its weight and shape; and, further, that if a cleat had been placed on the floor of the car at its lower end such would have prevented it from slipping and the accident would not have occurred. Defendant, however, asserts there was no actionable negligence on its part, this contention being based upon the following: The running board had a bend at one end which rested on the platform, so that when a trucker came into the car with an empty truck the weight of the plank held it in place and prevented it from slipping towards the car, there being in such case no jar, shove or push on the plank such as occurred when a load was taken up it; further, that for many years such planks had been used in defendant's yards under like circumstances, without being cleated; that there was no evidence tending to show that a failure to use a cleat created a dangerous condition or affirmative proof that the running board was either likely to or ever had slipped previously, or that any accident of the kind had theretofore occurred. On the other hand a running board like the one in use at the time of the accident was exhibited to the jury, and it appeared that defendant's custom was to cleat such

boards when loading cars; this difference of custom being referred to the fact that cars remained stationary when being loaded, whereas those being unloaded were frequently switched about. There was no evidence whether running boards had ever previously slipped or not, or whether accidents had or had not theretofore occurred in connection with their use, or what the practice of other railway companies was with reference to cleating runways.

We confess inability to see more in defendant's defense of its failure to use cleats when unloading cars, than a claim of inconvenience. Furthermore, it is clear that, notwithstanding the fact that in the course of unloading cars they were frequently moved from place to place, thus necessitating temporary removal of the running board, this could easily have been done with a cleat in place. That there was danger of a running board slipping if not secured by a cleat, was recognized in the use of cleats when loading cars, and likewise proved by the accident which in fact occurred.

With reference to defendant's other claims, it is sufficient to say that compliance even with a general custom does not, of itself, constitute due care. *McMahon v. Illinois Central R. Co.* 127 Minn. 1, 148 N. W. 446; 2 *Dunnell*, Minn. Dig. § 7049. Neither can custom or usage justify a negligent act. *Boos v. Minneapolis, St. P. & S. S. M. Ry. Co.* 127 Minn. 381, 149 N. W. 660. Nor is mere lack of evidence regarding previous slipping of running boards, or of accidents so caused, persuasive of the absence of negligence.

We hold the question of defendant's negligence was for the jury.

2. Were the damages excessive? The verdict was for \$7,000, which the trial court reduced to \$6,000. Plaintiff, when injured, was a healthy, strong, vigorous laboring man, 24 years old. He had no trade, and his earning capacity was not shown. He was confined in bed for three months, during part of which time he had to have several nurses and suffered intense pain, the latter continuing to some extent until the trial. He had several operations on his knee, which, by reason of his condition at such time, he was compelled to undergo without the administration of anaesthetics; and it was necessary to keep his leg in a cast for several months. The final result was that the functions of the knee joint were destroyed

and it became permanently stiffened. His hospital and nurses' bills incurred amounted to \$577, and the jury might have found his indebtedness to his physician to be \$750; which would reduce the general damages to less than \$4,700. We do not regard this amount as justifying interference with the verdict.

Order affirmed.

---

WILLIAM F. LUNDEEN v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>

February 5, 1915.

Nos. 18,980—(205).

**Federal Employer's Liability Act — evidence of pecuniary loss.**

Plaintiff's intestate was a common laborer, 23 years old when killed. He had remained with and assisted his parents until a few months previous to his death. Out of his first month's wages he sent \$10 to his father because of the latter's need. The parents worked on a farm but did not own it. In this action under the Federal Employer's Liability Act it is *held* that there was not such a failure of proof of pecuniary loss to the parents that defendant was entitled to either judgment notwithstanding the \$2,000 verdict, or a new trial.

Action in the district court for Ramsey county by the administrator of the estate of Nikolai Lepisto, deceased, to recover \$10,000 for the death of his intestate. The case was tried before Quinn, J., and a jury which returned a verdict in favor of plaintiff for \$2,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

*M. L. Countryman* and *A. L. Janes*, for appellant.

*T. D. Sheehan*, *Thomas D. Schall* and *Burdett C. Thayer*, for respondent.

<sup>1</sup> Reported in 150 N. W. 1088.

HOLT, J.

Plaintiff's intestate, Nikolai Lepisto, met death while in defendant's service under circumstances creating a cause of action under the Federal Employer's Liability Act (35 St. 65, c. 149). His parents are the beneficiaries. There was a recovery. Defendant's motion in the alternative for judgment or a new trial was denied and it appeals.

But one question is presented, and is thus stated by defendant: "The sole contention of appellant in this case is that there is no evidence from which the jury was justified in finding that the respondent suffered any pecuniary loss whatever on account of the death of the said Nikolai Lepisto." The evidence bearing upon that proposition is in substance this: Deceased died within 20 minutes after the accident. He was then 23 years of age. He came to this country two months before. Prior thereto he had lived with his parents in Finland. While here he worked one month in a lumber camp, and about two weeks for defendant as an ordinary laborer unloading ore cars upon the docks at Allouez, Wisconsin. His wages are not disclosed. An older brother who worked for defendant and was near by when the accident happened, gave the only evidence there is in the record from which to deduce the pecuniary loss sustained by the parents in the death of their son. This brother arrived here a few months ahead of deceased and he had not lived with the parents for about five years previous thereto, but had been at work some 50 or 60 miles distant. However, he made visits for a week or two at a time, at intervals of two to six months during those years, so that, the fair inference is, he knew the situation. This brother testified that Nikolai assisted his parents, saying: "Sometimes he gave money and sometimes they took a piece of work together and father got most of the results of the work, even if the old man wasn't able to work as hard as he would." The father's business was farming and "wood's work, whatever he can; I mean when he is able to." He did not own any farm. Two sons, 18 and 20 years old, remain with the parents. The latter are about 60 years of age. After the deceased finished his month's service in the lumber camp he sent his father \$10 because "the father needed it."

It must be conceded that the evidence is scant and not what could be desired. The parents' testimony is not here, and the great obstacles in the way of obtaining the same from a distant and inaccessible country may account for, if not excuse, its absence. But taking the evidence as it is found, may we say there is no support for the amount of the verdict? Under our decisions we think there is. The facts indicate that the parents were in need of financial assistance; that the deceased had during his minority and for two years in addition given such aid both in money and its equivalent, work; and that he had the disposition to continue the same, since, from his first wages in this country, he sent his father \$10. It is also apparent that the deceased was industrious, and was earning wages, at least those of the ordinary laborer. We think these are factors from which the jury could find that in the death of their son the parents sustained a substantial pecuniary loss. In the case of the death of young minors by wrongful act parents have been allowed substantial recovery. In *O'Malley v. St. Paul, M. & M. Ry. Co.* 43 Minn. 289, 45 N. W. 440, a verdict of \$3,000, for the death of a child 6 years old, was held not excessive; the same amount for death of a laborer's child six and a half years old was sustained in *Gunderson v. Northwestern Elev. Co.* 47 Minn. 161, 49 N. W. 694, and therein the court discusses the basis upon which the jury may predicate the estimate of pecuniary loss to the father. In *Gray v. St. Paul City Ry. Co.* 87 Minn. 280, 91 N. W. 1106, a verdict of \$2,750, for a child 5 years and 9 months, held not too large. See also 18 Ann. Cas. p. 1225, for cases from other courts. True, some courts place the basis of recovery in the case of minors, in a large measure, upon the right of the parent to the earnings of the child. But how uncertain are not the factors upon which to calculate the damages on account of the probable earnings during minority in a case where a child of tender years is killed by wrongful act? And as a practical matter, in this age of compulsory education which keeps children in school until they are almost of age, must it not be said that it is exceedingly problematic whether the expense of education and support of a child to majority does not exceed the earnings of such child during that time? So that theorize as we may, little,

if any, aid is derived from keeping in mind any distinction between minor and adult children in fixing the parent's pecuniary loss in case of death from wrongful act. Pecuniary loss measures the damages in either case.

A few of our cases involving the pecuniary loss to parents from the death of an adult child show that the facts, upon which damages were awarded, pointed with no more certainty to the amount of the verdict, as sustained or fixed by the court, than in the case at bar. In *Hutchins v. St. Paul, M. & M. Ry. Co.* 44 Minn. 5, 46 N. W. 79, the verdict was reduced from \$3,500 to \$2,000. There the deceased was 39 years old, and divorced, the mother being the beneficiary. He had accumulated no property; was working for \$2.25 per day. The mother thought he gave her about \$50 a year, but, when interrogated as to what moneys he did give her, could only recall \$13 at one time and \$5 at another. The mother was living on a farm with her second husband. In *Sieber v. Great Northern Ry. Co.* 76 Minn. 269, 79 N. W. 95, the court upholds a recovery of \$2,500 to the father for the death of a son 28 years old earning \$60 to \$70 a month, where it had not been made to appear that the son, after becoming of age, had ever given the father pecuniary aid or had accumulated any property. *Swanson v. Oakes*, 93 Minn. 404, 101 N. W. 949, holds a verdict of \$2,000 not excessive, where it merely appeared that the decedent was 21 years of age, in good health, apparently faithful to his duties, and "that his mother, residing in Sweden, depended upon his efforts to some extent for her support." In *Holden v. Great Northern Ry. Co.* 103 Minn. 98, 114 N. W. 365, a verdict for \$3,000 was sustained for the death of an unmarried son 23 years old, a farm laborer, of good habits, sound body and mind, who shared part of his earnings with his parents. In *McVeigh v. Minneapolis & R. R. Ry. Co.* 113 Minn. 450, 129 N. W. 852, the verdict for \$3,750 was allowed to stand for the death of a son. In *Tegels v. Great Northern Ry. Co.* 120 Minn. 31, 138 N. W. 945, held \$3,250 not excessive, where deceased had rendered services and contributed about \$100 a year to his parents. See also *Thomas v. Chicago Great Western R. Co.* 112 Minn. 360, 128 N. W. 297, verdict, reduced to \$3,250, held not excessive. See also

*Bremer v. Minneapolis, St. P. & S. S. M. Ry. Co.* 96 Minn. 469, 105 N. W. 494, where the father could not state whether the deceased son helped him to the extent of \$25 or \$50 a year, this court reduced the recovery from \$3,000 to \$2,000. Meager and incredible evidence of pecuniary aid by decedent moved the court to reduce a verdict to \$2,500 in *Hirschovitz v. Pennsylvania Ry. Co.* 138 Fed. 438. See also *Hopper v. Denver & R. G. R. Co.* 155 Fed. 273, 84 C. C. A. 21, as to what evidence may show substantial pecuniary loss to a parent.

Of course, we realize that this case is ruled by the construction given this act of Congress by the Federal courts. An examination of the decisions of the Supreme Court of the United States indicates that, under statutes permitting a recovery for death by wrongful act for the benefit of surviving parents, the same rule governs the damages as was announced by this court in *Hutchins v. St. Paul, M. & M. Ry. Co.* supra, and always adhered to. Namely, the recovery is limited strictly to the probable pecuniary loss suffered by the parents. Also that the factors upon which the jury may base the estimate of damages are: Decedent's age, health, habits, earning capacity, disposition to aid the beneficiaries, the age and circumstances of the latter, and the aid actually rendered them during decedent's lifetime. *Baltimore & Potomac R. R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. ed. 624, and *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417, Ann. Cas. 1914C, 176, where expressions like these are used or cited with approval: "Nevertheless the words (pecuniary loss) as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child. \* \* \* No hard and fast rule by which pecuniary damages may in all cases be measured is possible. \* \* \* The rule for the measurement of damages must differ according to the relation between the parties plaintiff and decedent." *American R. Co. of Porto Rico v. Didrickson*, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. ed. 456; *Gulf, Col. & Santa Fe R. R. Co. v. McGinnis*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. ed. 785; *Garrett v. Louisville & Nashville R. Co.* 235 U. S. 308, 35 Sup. Ct. 32, 59 L. ed. —.

The cases cited by appellant are not in point, or else sustain respondent. *Michigan Central R. R. Co. v. Vreeland*, supra, was reversed because of an instruction upon the measure of damages permitting the jury to include those matters not susceptible of money valuation, such as the loss to the wife of the companionship and advice of her husband. The same error resulted in a reversal in *American R. Co. of Porto Rico v. Didrickson*, supra. *Garrett v. Louisville & Nashville R. Co.* supra, turned on the failure to allege that the parents suffered any pecuniary damage. In *Dooley v. Seaboard Air Line Ry. Co.* 163 N. C. 454, 79 S. E. 970, a case like this, the evidence is held sufficient for substantial damages under the Federal act "if it tends to show that the deceased was a young man of good habits and character, in good health, and had helped his father and was disposed to give him his last cent if he needed it; that the father was growing old, and, while not actually dependent on the son for support at the time of the latter's death, he could not tell how soon he might be." The case was reversed upon an instruction as to the measure of damages, correct under the decisions of North Carolina, but erroneous under the *Vreeland* case and also under the rule obtaining in this state. *Boyle v. Columbian Fire Proofing Co.* 182 Mass. 93, 64 N. E. 726, cited by appellant, is an authority for the respondent. Under a statute of that state the parents, in each of the three cases involved, showed no more substantial basis for an estimate of the probable pecuniary loss to them than in the case at bar, yet a verdict reduced to \$2,000, in each case, was upheld. *McCoullough v. Chicago, R. I. & P. Ry. Co.* 160 Iowa, 524, 142 N. W. 67, 47 L.R.A.(N.S.) 23, sustains appellant in a measure, but it is to be noted that the evidence of aid given by decedent to the parents, as testified to by them, was more meagre and unsatisfactory than in the instant case, and the verdict there assailed was for \$5,000.

One ground for judgment in defendant's favor urged in the court below was that the beneficiaries were aliens. This is abandoned here, evidently, because set at rest by *McGovern v. Philadelphia & Reading R. R. Co.* 235 U. S. 389, 35 Sup. Ct. 127, 59 L. ed. —.

We have not considered the effect of section 9 of the Federal

Employer's Liability Act as to the survival of Nikolai Lepisto's cause of action, he having lived during a few minutes after the injury, since it was not claimed to be applicable at the trial.

Our conclusion is that defendant was not entitled to judgment notwithstanding; and that the evidence supports the recovery.

Order affirmed.

---

STATE ex rel. CHARLES T. SPLADY and Others v.  
DISTRICT COURT OF HENNEPIN COUNTY and Another.<sup>1</sup>

February 5, 1915.

Nos. 18,991—(220).

**Workmen's Compensation Act — finding — evidence.**

A finding that plaintiffs, the parents of a deceased workman, were "wholly dependent" upon him for support, within the meaning of the Workmen's Compensation Act (G. S. 1913, § 8208, subdivisions 1, 2 and 3), *held* sustained by the evidence.

Upon the relation of Charles Splady, James Albee, Harvey B. Smith, partners doing business under the name of Splady, Albee & Smith, and the Ocean Accident & Guarantee Corporation, Ltd. of London, England, this court issued its writ of *certiorari* directed to the district court for Hennepin county and the Honorable John H. Steele, one of the judges thereof, to review the proceedings of that court in an action against relators brought under the Workmen's Compensation Act. Affirmed.

*John Junell*, for relators.

*A. R. Chesnut* and *E. T. Chesnut*, for respondents.

BUNN, J.

*Certiorari* to review the decision of the district court in an action under the Workmen's Compensation Act.

<sup>1</sup> Reported in 151 N. W. 123.

Anton Berg died April 25, 1914, from injuries received shortly before while in the employ of relators Splady, Albee & Smith. He was an unmarried man and lived with his father and mother in their home in Minneapolis. At the time of his injury and for some time prior thereto he was receiving \$24 per week as wages. From December 1, 1913, to April 16, 1914, the date of his injury, Anton contributed at least \$50 per month to the support of his parents, the plaintiffs in this action. The trial court found as a fact that plaintiffs were on April 16, 1914, and had been for some months prior thereto, wholly dependent for support upon the deceased. Judgment was ordered in favor of plaintiffs and against the defendants (relators in this proceeding) for the sum of \$8.40 per week for 300 weeks, in addition to \$200 for medical, surgical and hospital care and treatment. Judgment was entered accordingly.

The contention of relators is that the finding of the trial court to the effect that plaintiffs were wholly dependent for support upon the deceased is not sustained by the evidence. If this claim is correct, if plaintiffs were only "partially dependent" upon the support of deceased, the amount of the weekly payments is clearly excessive; but if they were "wholly dependent" upon his support, the allowance was correct.

Section 8208, G. S. 1913, in subdivisions 1, 2 and 3, attempts to define those who shall be deemed "wholly dependent," "actual dependents," and "partial dependents." Subdivision 1 provides that the wife and minor children shall be presumed to be "wholly dependent." Subdivision 2 says that husband, mother, father, etc., who were "*wholly supported*" by the workman at the time of his death and for a reasonable period prior thereto, shall be considered his "actual dependents." Subdivision 3 provides that any dependents named in subdivision 2 who regularly derived "part of their support" from the wages of the deceased workman shall be considered his "*partial dependents*."

Subdivision 12 provides that if the deceased employee leave no widow, children or husband, but does leave a parent or parents either or both of whom are *wholly dependent* on the deceased, there shall be paid, if one parent, 25 per cent of the monthly wages

of deceased, if both parents, 35 per cent thereof. Subdivision 15 provides that "partial dependents shall be entitled to receive only that proportion of the benefits provided for actual dependents which the average amount of the wages regularly contributed by the deceased to such partial dependent at, and for a reasonable time immediately prior to the injury, bore to the total wage of the deceased, during the same time."

The facts which bear upon the question whether plaintiffs were "wholly supported" by deceased, "wholly dependent" upon him or whether they derived but "part of their support" from his wages, were "partial dependents," are undisputed, and are as follows: The father was an invalid and since December 1, 1913, had been wholly incapacitated to contribute in any measure to the support of himself or the members of his family; the mother has been a helpless invalid for more than six years; an unmarried daughter made her home with plaintiffs and paid \$4 per week for her board, room, etc., which was the cost of these accommodations; a married daughter and her child lived with plaintiffs from August, 1913, to April 16, 1914; during this time she did all the household work, and cared for her invalid father and mother. Until December 1, 1913, she received \$4 per week in payment of her services. Since that date she performed them gratuitously. The court found that the reasonable value of the services of this daughter was \$4 per week over and above her board and that of her child.

The question is whether these gratuitous services of the daughter for a few months made the parents only "partially dependent" upon the son's support. It is clear that the only money the parents or family had for their support came from the son Anton. He was the real head of the family, the bread winner. The daughter's services had been rendered for but a short time, and may well be considered a temporary help. We should give the provisions of the act a very liberal construction. It is rather difficult to understand on what theory the legislature makes its distinction between those who are "wholly dependent" and those who are but partially so. The criterion should be, as it seems to us, the amount of wages that the workman has contributed monthly to the dependent, rather

than whether or not the latter had received some measure of support from other sources. But of course this is for the legislature to determine. It may certainly be argued with some force that one who owns his home, or for whom others perform friendly services, is not, technically speaking, "wholly dependent" upon the cash received from the wages of the worker of the family. Nor is one who receives help from a charitable organization, or from neighbors. But we cannot suppose that the legislature intended that such a person should be considered only a "partial dependent." Giving the act a reasonable and liberal construction, our conclusion is that the trial court was justified in finding that plaintiffs were wholly dependent upon the deceased for their support.

Judgment affirmed.

---

FIRST NATIONAL BANK OF HASTINGS v.  
CORPORATION SECURITIES COMPANY.<sup>1</sup>

February 5, 1915.

Nos. 18,996—(208).

**Finding — evidence — consideration for agreement.**

1. Finding that a written agreement, unilateral in form, to repurchase from plaintiff's assignor certain shares of stock assigned to him in the course of and pursuant to a general settlement between him, defendant and its president, was a part of such settlement, and hence supported by valid consideration, *held* sustained by the evidence.

**Finding — agreement of corporation.**

2. The evidence warranted a finding that the agreement was defendant's undertaking, notwithstanding the character of its president's signature thereto.

**Contract assignable.**

3. The agreement was assignable.

<sup>1</sup> Reported in 150 N. W. 1084.

**Specific performance — prosecution of action by assignee.**

4. Plaintiff, to which the stock was also assigned, being authorized by the assignment to enforce the agreement, and to deliver it and the stock to defendant upon payment of the specified price, and to receive and receipt for the latter, had the right to continue the prosecution of its action to enforce the agreement, though the debt to secure which the assignment was made was paid after the action was brought.

**Mutuality of obligation.**

5. The agreement to repurchase, being supported by the considerations involved in the general settlement, did not lack mutuality of obligation; nor was it wanting in mutuality of assent of parties.

**Specific performance — mutuality of remedy — decree.**

6. Plaintiff having elected, within the time prescribed, to sell the stock back to defendant, and having made proper and sufficient tender of the stock and agreement, both before the bringing of the action and on the trial thereof, the fact that the agreement theretofore was lacking in mutuality of remedy did not deprive the court of the power to decree its specific performance.

**Specific performance.**

7. Mutuality of remedy is not the sole test of specific enforceability, and is not always essential thereto.

**Same.**

8. A contract for the purchase of shares of stock may be specifically enforced at the instance of the seller, where the difficulty in ascertaining the value of the stock is such that his remedy by action at law to recover damages for breach of contract is inadequate.

**Same — uncertain value of stock — finding.**

9. The finding of the trial court that the stock in suit was of such uncertain value as to warrant specific enforcement of defendant's contract to purchase it, sustained.

Action in the district court for Hennepin county for specific performance of an agreement to repurchase bank stock or to recover \$2,250. The case was tried before Hale, J., who made findings and ordered judgment in favor of plaintiff. From an order denying its motion for a new trial, defendant appealed. *Affirmed.*

*Laybourn & Lucas*, for appellant.

*Brown & Guesmer*, for respondent.

PHILIP E. BROWN, J.

Action to enforce specific performance of an agreement to buy shares of stock. The complaint was sustained on demurrer in 120 Minn. 105, 139 N. W. 296, where its allegations are fully stated. Subsequently defendant answered, denying all its averments except the corporate existence of the parties, the cause was tried, and findings made for plaintiff. Defendant appealed from an order denying a new trial.

Prior to April 27, 1911, Doctor Bradford was a stock- and bondholder in defendant. On that day he and the company, acting through its president, Mr. Lambrecht, entered into an agreement with the view of the former severing his relations with the latter and also certain business connections theretofore existing between him and Lambrecht personally. This result was accomplished by Bradford turning over to defendant and Lambrecht his stock in and bonds of the company, together with other securities, and conveying certain lands; in consideration whereof certain securities and shares of stock not involved in this suit were delivered to Bradford. As a part of the same transaction the 15 shares of stock in the Crocker bank here involved were also assigned to him; and plaintiff claims that, prior to the consummation of the transaction and as a part of it, defendant executed the instrument sought to be specifically enforced, which was written on defendant's letterhead, and reads as follows:

"Dr. E. B. Bradford,

April 27, 1911.

"Hudson, Wisconsin,

"Dear Sir:

"On or before August 1st we agree to purchase back from you the 15 shares of stock in the Crocker State Bank, Crocker, South Dakota, transferred today from James J. Lambrecht to yourself at a price of \$150 per share. The Capital Stock of said Bank is \$10,000 and its surplus is \$5,000. We will not be bound by this agreement after August 10, 1911.

"Yours truly,

"James J. Lambrecht,

"President."

Defendant, while admitting the shares were assigned and delivered to Bradford at the same time the other transaction was closed, insists that the writing quoted was no part of it and not involved therein, but was executed as an aftermath to the entire agreement, without consideration, simply as voluntary evidence on the part of Lambrecht personally of the value of the Crocker Bank stock, and, while made on the same day and before the parties separated, was not written until the whole transaction was closed. The court resolved these contentions in plaintiff's favor, and also found that on April 28, 1911, Bradford assigned the instrument in suit, together with the shares, as collateral security for his debt, to plaintiff, who, on August 1, 1911, tendered defendant the shares and the agreement and demanded the purchase price, which was refused, such tender being thereafter repeated on the trial.

1. Defendant insists that the findings in these regards are not justified. We have examined the record and, under the settled rules applicable, find no ground for interference. The court's opportunity to judge of credibility of the witnesses is decisive on this question.

2. We hold the agreement to repurchase assignable; but defendant contends it was not its contract, but, at most, Lambrecht's individually; citing our cases to the effect that where the term "agent," "trustee," or the like, is affixed to a signature, *prima facie* it constitutes mere description of the person of the party so signing. Such, however, merely raises a presumption, and, considering the form of the agreement, the subsequent correspondence introduced in evidence, and the testimony of Mr. Lambrecht, the court was fully warranted in finding that it was defendant's undertaking. 1 Durnell, Minn. Dig. § 2115.

3. During the trial it developed that several months after this action was commenced Bradford paid his indebtedness to plaintiff for which the stock had been pledged; but it retained the same and also the agreement to repurchase, and Bradford's assignment of the latter to plaintiff expressly authorized it to deliver the stock to defendant upon payment of \$2,250, and to receive and receipt therefor, and also to enforce the agreement. Notwithstanding, therefore,

the payment of the debt, plaintiff had the right to continue the prosecution of the action. G. S. 1913, § 7674, and cases there cited.

4. Defendant urges that, even so, no valid and enforceable contract resulted, whereby it was bound to repurchase the shares from Bradford upon his election to sell them back to it within the time prescribed; the contention being that since, upon the trial, no agreement on his part to sell was established, the contract was unilateral and unenforceable for lack of "mutual assent by both parties," and likewise for want of mutuality of obligation. But clearly there was the former, for both parties definitely agreed that defendant would repurchase the stock if Bradford elected to sell it within the prescribed time; and, as to mutuality of obligation, such is found in the conclusion of the court that the agreement to repurchase was a part of the general settlement between the parties. It is immaterial, therefore, so far as concerns mutuality of obligation, whether Bradford agreed to sell or not; for in any event there resulted in his favor an option, supported by a sufficient consideration, to resell to defendant within a certain time, which, by its terms, bound it to repurchase if he should so elect to sell. From this it follows that the only respect in which the agreement may be said ever to have lacked mutuality is that it was an option, enforceable at the exclusive election of one of the parties, and hence lacking in mutuality of remedy; and while defendant takes the position this renders it unenforceable specifically, such is not the law of this state, it being sufficient if mutual enforcement is practicable when performance is decreed, so that the court may "then be able to enforce all of the terms of the contract at once, *in praesenti*," and "have the power to superintend the performance of the conditions of the contract by each of the parties, and in all its parts." *Brown v. Munger*, 42 Minn. 482, 486, 44 N. W. 519, 521. When plaintiff, exercising the option acquired, together with the stock, from Bradford, made tender, both prior to the bringing of the action and on the trial, the option, which up to that time was necessarily unilateral in form, became a bilateral contract, certain, definite, mutually binding and specifically enforceable. *The Gregory Co. v. Shapiro*, 125 Minn. 81, 86, 145 N. W. 791; *Vent v. Duluth Coffee & Spice Co.* 64

Minn. 307, 67 N. W. 70; *Brown v. Slee*, 103 U. S. 828, 26 L. ed. 618; *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394; *Schnuettgen v. Frank*, 213 Fed. 440, 444; *Frank v. Schnuettgen*, 187 Fed. 515, 109 C. C. A. 281; *Western Timber Co. v. Kalama River L. Co.* 42 Wash. 620, 628, 85 Pac. 338, 6 L.R.A.(N.S.) 397, 114 Am. St. 137, 7 Ann. Cas. 667; *Beddow v. Flage*, 22 N. D. 53, 59, 132 N. W. 637; *Turley v. Thomas*, 31 Nev. 181, 201, 101 Pac. 568, 135 Am. St. 667; *Northern Central R. Co. v. Walworth*, 193 Pa. St. 207, 213, 44 Atl. 253, 74 Am. St. 683; *Pollock v. Brookover*, 60 W. Va. 75, 53 S. E. 795, and note, 6 L.R.A. (N.S.) 403; *Pomeroy, Specific Performance* (2d ed.) §§ 167-169; 21 Am. & Eng. Enc. (2d ed.) 935; 36 Cyc. 625; 16 Harvard Law Rev. 72; 18 Id. 457, 20 Id. 57. The rule is well expounded in *Peterson v. Chase*, 115 Wis. 239, 241, 91 N. W. 687, 688, where it was said, with regard to specific enforcement of optional agreements to sell land:

"Upon fundamental principles there seems to be no difficulty in supporting the validity of such agreements. In their ultimate analysis they are but offers to sell, and, if accepted before withdrawal, become binding, because thereupon the other party becomes bound, and a complete contract arises, entirely mutual. Nor, on principle, is there any reason why the seller, for a good consideration, may not bind himself that the offer shall not be withdrawn before a specified date. A so-called time option to purchase contains only the above elements, namely, an offer to sell, accompanied by agreement to hold such offer open."

Again, in *Doherty v. Rice*, 186 Fed. 204, 213, it was said, with reference to a contract for the sale of corporate stock, which originally lacked mutuality of remedy:

"The objection of want of mutuality of remedy in the sense in which equity uses those terms no longer exists. Complainants seeking specific performance offer to perform on their part and unreservedly submit themselves to the court to decree whatever may be proper in enforcing the rights of the other party to the contract. If defendants accept their offer, complainants cannot afterwards retract it, and thus escape a decree in favor of the defendants. If,

on the other hand, defendants refuse the offer, and unsuccessfully resist specific performance, they cannot be compelled to perform unless performance of every stipulation of the contract for their benefit is likewise coerced from complainants. In either event complete enforcement of the legal and equitable rights of the parties will be effected by one comprehensive decree, and the defendant cannot be remitted to a court of law for the enforcement of any of their rights."

The facts of the case under consideration bring it within both of these expositions of the rule as to necessity of mutuality of remedy. Moreover, equity no longer regards this ancient maxim as inviolate where its application would accomplish injustice. Said Mr. Chief Justice Start, in *Lamprey v. St. Paul & Chicago Ry. Co.* 89 Minn. 187, 192, 94 N. W. 555, 557:

"The early equity doctrine that, if the right to specific performance of a contract exists at all, it must be mutual, was based largely upon notions of expediency, rather than upon any principle of abstract justice, and has been materially modified. The doctrine of this court is that, if a contract for the conveyance of real estate is supported by a valid consideration, and there is no other good reason why it should not be specifically enforced except the want of mutuality of remedy, it will be so enforced."

See also *The Gregory Co. v. Shapiro*, *supra*, 86; *Eckstein v. Downing*, 64 N. H. 248, 9 Atl. 626, 10 Am. St. 404. On principle this doctrine would apply equally where specific performance of a contract relating to personal property is sought.

5. Defendant also insists it was error to grant specific performance, because plaintiff had an adequate remedy at law. This subject received some consideration in *Northern Trust Co. v. Markell*, 61 Minn. 271, 63 N. W. 735, and *Moulton v. Warren Mfg. Co.* 81 Minn. 259, 83 N. W. 1082, and an interesting discussion of the development of the equitable jurisdiction to enforce contracts of the nature here involved will be found in 135 Am. St. 689, note. The power of a court of equity, upon a proper showing, to grant relief in such cases is now universally conceded, and in 50 L.R.A.

501, note, the present state of the law in this regard is well stated, as follows:

"The general rule in this country is that a contract for the sale of corporate stock will not be specifically enforced, where the stock can be purchased on the market and its value can be readily ascertained, unless there is some special reason for the purchaser's obtaining the same, but where the shares are limited and not easily obtainable, or where their value cannot be readily ascertained, the contract will be enforced. The tendency seems to be towards a more liberal allowance of the remedy. In England it seems to be allowed almost as a matter of course, except in case of government stocks, in which case it has generally been refused." See also 2 Cook, Corp. (7th ed.) § 338.

In administering the remedy current authority regards the jurisdiction as flexible, depending largely upon the facts of each individual case, and not bound by hard and fast rules; a reasonable discretion being allowed in awarding relief, and in determining the right thereto the situation involved should be considered from a practical, rather than a theoretical, view point.

The inquiry, then, is whether the court's determination that the value of the stock was not readily ascertainable was unsupported by the evidence; and we cannot so hold. Crocker, South Dakota, where the bank issuing the stock was located, had about 150 inhabitants. Another bank, having twice as much business, was also located there. A large part of the surrounding country was suitable and used for grazing purposes only. Part of the tributary population consisted of a "drifting class," thus making bank loans and discounts extra-hazardous. The bank was organized in 1907, its capital being \$10,000. Defendant and its officers held a majority of its stock, which was not listed in commercial reports, and only two or three sales thereof were ever made, these being between officers of the company or local people. The bank never paid a dividend. Its books showed a surplus of \$4,619 on April 27, 1911, which was reduced to \$3,473 on August 1, 1911, and the profits for the year preceding December, 1911, were \$589. While, therefore, there was some testimony to the contrary, it is patent under

all the circumstances disclosed that the establishment of the value of the stock would involve not only the obviously difficult task of proving the value of the bank's assets, but also a speculative forecast upon its prospects; so that it is doubtful whether any basis could be laid upon which to found a reasonable approximation of market value. At least such could not be done without imposing an unwarranted burden on plaintiff.

We discover nothing inequitable in the relief granted, and find no reversible error.

Order affirmed.

---

LLOYD WILKES and Another v. EPHRIAM M. HOLMES.<sup>1</sup>

February 5, 1915.

Nos. 19,033—(212).

**Replevin — absence of signature from agreement.**

1. A written contract, made in duplicate, purporting to transfer an automobile from plaintiffs in consideration of a transfer by defendant to plaintiffs of certain shares of corporate stock, was not signed by one of the plaintiffs, although he was named in the body of the contract; but the other plaintiff and defendant signed the duplicates and retained one each; thereafter the automobile was delivered to defendant by the plaintiff who had not signed. *Held*, in this action of replevin, that the mere lack of the signature of one of the plaintiffs is not sufficient proof of an understanding or agreement that the contract was not to take effect until signed by both plaintiffs.

**Replevin — action against joint owner.**

2. Replevin does not lie against a joint owner, or tenant in common, of an article of personal property.

**Contract — indefiniteness.**

3. The contract here involved is not void for uncertainty or indefiniteness.

<sup>1</sup> Reported in 150 N. W. 1098.

Action of replevin in the district court for Mille Lacs county to recover possession of an automobile or \$500, the value thereof, and \$100 damages for its detention. The case was tried before Parsons, J., and a jury which returned a verdict in favor of plaintiffs and fixed the value of the property at \$1,500. From an order denying defendant's motion for a new trial, he appealed. Reversed.

*Laybourn & Lucas*, for appellant.

*Charles Keith and E. L. McMillan*, for respondents.

HOLT, J.

Plaintiffs brought this action to recover possession of an automobile which they claimed to own. Defendant answered that he was the owner, having obtained it from plaintiffs under a contract by which he traded 60 shares of stock in a creamery corporation for the car. Plaintiffs had a verdict, and defendant appeals from the order denying a new trial.

The record discloses this situation: Plaintiffs, father and son, lived at Milaca, and, at the time of this transaction, were in the automobile business selling and trading cars. A. C. Wilkes, the father, had previously been associated with one Smith. How the son Lloyd came to enter the firm, or have any interest in the car involved, does not appear from plaintiffs' testimony. A. C. Wilkes bought and paid for it in the first instance. In the summer of 1913, A. C. Wilkes met defendant, and, about the time the present trade was made, there was concluded between them a real estate deal in which 90 shares of creamery stock figured. The real estate transaction had no connection with the automobile deal, but some disagreement therein seems to have furnished the occasion for this law suit. On September 17, 1913, A. C. Wilkes and defendant met in Minneapolis to negotiate this trade of the automobile for the 60 shares of stock in the creamery. They came to terms, and repaired to an attorney's office to execute the contract. The contract was prepared consisting of typewritten duplicates, plaintiffs being named therein as parties of the first part, and defendant as party of the second part. The contract reads: "Said party of the first part agrees and does hereby sell, assign, transfer and set over unto said party

of the second part" the automobile, describing it, and "said party of the second part does hereby agree and hereby sells, transfers and set over to party of the first part" the shares of creamery stock, describing them, "subject however to an incumbrance of forty-five hundred dollars." The only other agreement contained in the instrument is this: "Said party of the first part giving their promissory note to the Market State Bank of the city of Minneapolis in the sum of forty-five hundred dollars (\$4,500) to which note said party of the second part does hereby agree to sign as indorser and agrees with said parties of the first part to carry said note for one year or longer as said parties of the first part may desire after maturity of said note." At the time A. C. Wilkes was informed that the shares of stock were then held by said bank as collateral security to a note in the amount stated, signed by defendant. That note came due November 5, 1913. Each duplicate was signed, witnessed and acknowledged by plaintiff A. C. Wilkes and the defendant, one being retained by Wilkes and the other by defendant. In the duplicate produced by Wilkes at the trial we find a line drawn with pen and ink below the two signatures and at the end of the line is written the word "seal." The line and word "seal" were never placed on the duplicate exhibited by defendant. After the execution and exchange of the contracts defendant went with A. C. Wilkes to Milaca for the purpose, as defendant claims, of receiving the automobile. A. C. Wilkes contends that defendant went to see whether he would accept it or not. When they arrived at Milaca on Saturday, September 19, Lloyd had the car at Princeton. A. C. Wilkes by telephone requested him to bring it to Milaca. It was done. On Sunday morning defendant started for Minneapolis in the car. The Wilkes claim that defendant was in a hurry to get to Minneapolis and wanted Lloyd to take him there in the car, but Lloyd, having an engagement at Princeton, could go no further, and let defendant drive it from there on. Defendant denied that he asked either of them to drive the car to Minneapolis for his accommodation. Monday or Tuesday following, A. C. Wilkes came down to Minneapolis. He was at the Market Bank, and met defendant. Again the two disagree as to what took place. Wilkes claims

that by previous agreement he was to come down and go with defendant to the bank to close the deal. This is denied by defendant, insofar as it relates to the automobile trade.

The court instructed the jury, in substance, that plaintiffs were entitled to a verdict if they proved an understanding or agreement that the contract was not to take effect until it was signed by Lloyd Wilkes. At the trial and on the motion for a new trial defendant raised the objection that the evidence does not show a conditional delivery of the contract, that under any view of the case the action does not lie because as a matter of law the title of A. C. Wilkes passed to defendant, and that there is no evidence to support a verdict under the law as above stated. The assignments of error here present the same question.

The trial court instructed in harmony with the law of this state. "And any one who executes a contract may protect himself from liability thereon by affirmatively showing an express agreement that there should be no delivery until others executed it." *Naylor v. Stene*, 96 Minn. 57, 104 N. W. 685. But in this case there is an utter absence of any testimony that the contract should take effect only upon Lloyd signing it. Undoubtedly there was a delivery of the contract as between defendant and A. C. Wilkes. Not a word was at that time said about any other signature. Nor do either A. C. Wilkes or Lloyd claim that the subject was thereafter mentioned. The duplicate given to defendant contained no place for Lloyd's signature. Lloyd knew about the trade, read the contract Saturday, made no objection thereto, turned over the car to defendant without any expressed condition or reservation, and testified that he approved what trade his father made. Secret intentions of the plaintiffs as regards the signatures to the contract, or the delivery thereof, or of the car cannot now avail them. What is more, the admitted acts of plaintiffs disprove the claims that the contract was not to be deemed complete until Lloyd's signature, and that the deal was to be closed in the bank on Monday, for Lloyd did not come to Minneapolis either Monday or Tuesday, his name was never signed to the duplicate A. C. Wilkes had, nor was a \$4,500 promissory note bearing Lloyd's signature brought down. Without

Lloyd's presence and without his signature to duplicate contract and a note there was no possible way of closing the deal, on plaintiffs' theory, when A. C. Wilkes came to Minneapolis on Monday. In the face of this evidence, and without considering at all defendant's, we are of opinion that the instrument does not furnish sufficient evidence of incompleteness in itself "to sustain a finding that there was an understanding or agreement that the contract was not to take effect until it was signed by Lloyd Wilkes." The case of *Stub v. Grimes*, 38 Minn. 317, 37 N. W. 444, is relied on by respondent, but the contract there embodied mutual obligations which were to be performed in the future with reference to the subject matter of the agreement, and hence it was held that, until all signed, the contract was not complete. In the present case nothing was by the contract agreed to be done in the future either to the stock or to the automobile, but by the terms thereof the title passed at once. *Rail v. Little Falls Lumber Co.* 47 Minn. 422, 50 N. W. 471. A case more in point than *Stub v. Grimes* is *Naylor v. Stene*, supra, and the authorities therein cited, particularly *Dillon v. Anderson*, 43 N. Y. 231, wherein the syllabus reads: "A contract executed between two parties, and in the body of which a third person is also named as a party who does not join in the execution of it, is nevertheless, on its face good, as against the parties executing it, and it rests upon either party denying its validity, to show that he was not to be bound by it, until it was also executed by such third party. It must appear that, at the time the contract was entered into, the party expressly declared his intention not to be bound by it until it was executed by the third person, or he cannot afterward set up the fact that the contract was not executed by such third person as an objection to its validity against himself." To the same effect is *Breiling v. Hybl*, 167 Ill. App. 165.

Let it be assumed that Lloyd was part owner of the automobile and that his interest did not pass, still, if defendant by the contract acquired the interest of A. C. Wilkes, this action in replevin does not lie. *Sheldon v. Brown*, 72 Minn. 496, 75 N. W. 709; *Busch v. Nester*, 70 Mich. 525, 38 N. W. 458. *Johnson v. Stone*, 111 Minn.

228, 126 N. W. 720, recognizes the rule, but applies an exception, and so does *Fines v. Bolin*, 36 Neb. 621, 54 N. W. 990.

It is also urged that the contract is void because indefinite and uncertain. It is clear and certain as to the automobile and the creamery stock, the exchange of which was the main object of the parties. The agreement in respect to defendant lending his name to carry the indebtedness to which the 60 shares of creamery stock was subject may be somewhat vague. But even so, its purpose is stated with sufficient clearness to enable the parties to comply with the provisions thereof, especially when considered in connection with surrounding circumstances.

We see no merit in the contention of plaintiffs that defendant has failed to perform. A fair construction of the provision just referred to, and above set out in *haec verba*, indicates that plaintiffs were to take the first step by presenting the note for defendant to indorse. Then it was up to him to see that the bank accepted it and continued the credit.

Since a new trial must result it is not necessary to consider other assigned errors not likely to again arise.

Order reversed.

---

## TOM DAVIS and Another v. GREAT NORTHERN RAILWAY COMPANY.<sup>1</sup>

(HAYNES CASE.)

February 5, 1915.

Nos. 19,034—(239).

### Enforcement of attorney's lien.

1. By section 4955, G. S. 1913, an attorney is given a lien for his compensation upon the cause of action from the time of the service of the summons in the action. Where the action is settled by the parties before trial

<sup>1</sup> Reported in 151 N. W. 128.

without notice to or consent of the attorney, the attorney may elect to proceed for the enforcement of his lien rights by an independent action against the defendant, or by intervention proceedings in the original action.

**Settlement by parties conclusive as to amount of recovery.**

2. Such a settlement when made in good faith and without purpose to defraud the attorney is final and conclusive of the amount of recovery in the action, and is the basis from which the attorney's compensation, fixed by a percentage agreement with the plaintiff, must be determined.

**Pendency of former action unknown to attorney.**

3. The pendency of a former action for the same cause, brought by other attorneys, and which was not pleaded in defense to the second action, and of which the attorneys in the second action had no notice, *held* not a bar to the lien rights of the attorneys in the second action.

**Attorney's lien not limited to taxable costs and disbursements.**

4. The lien given by the statute covers legitimate expenditures by the attorneys in the prosecution of the action, when included within the contract of employment, and it is not limited to such items of costs or disbursements as might be taxed as such against the defendant.

Action in the district court for Lyon county to enforce an attorney's lien for \$2,120. The substance of the answer is given in the opinion. The case was tried before Olsen, J., who denied defendant's motion to dismiss the action upon the ground that plaintiff had not chosen the proper remedy (his remedy being to proceed in the original action), and for the further reason that it appeared there was a former action pending against defendant, made findings and ordered judgment in favor of plaintiffs in the sum of \$75. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

*M. L. Countryman and A. L. Janes*, for appellant.

*Tom Davis and Ernest A. Michel*, for respondents.

**BROWN, C. J.**

One A. Warden Haynes brought an action against defendant for personal injuries alleged to have been caused by the wrongful acts of its agents and servants, claiming in his complaint damages in the sum of \$20,000. Issue was joined but before the cause came on for trial the company settled the claim with plaintiff therein, paying

him the sum of \$75 in full for his alleged injuries. Plaintiffs in this action, Davis & Michel, were attorneys for the plaintiff in that action and the settlement was entered into without their knowledge or consent. No part of the money received by Haynes on the settlement was paid to his attorneys, and the trial court found that he is insolvent. The attorneys brought the former action under an express contract with the plaintiff therein, by which it was agreed that they should receive as compensation for their services one-half of whatever recovery was had against the company, and further, "that in case second parties (the attorneys) advance any money for expenses in said prosecution of said claim, said sum is to be deducted from the total amount received thereon before a division as heretofore set forth." The contract also provided that Haynes should not settle the action without the consent of his attorneys, and the same prohibition was placed upon the attorneys. This stipulation is, however, of no importance; it was invalid and did not in any way prevent the plaintiff from making such settlement of the action as he thought proper, and without consulting his attorneys (*Boogren v. St. Paul City Ry. Co.* 97 Minn. 51, 106 N. W. 104, 3 L.R.A. [N.S.] 379, 114 Am. St. 691), though the settlement did not relieve the company from liability under the present attorney's lien statute. G. S. 1913, § 4955.

Subsequent to the settlement the attorneys brought this independent action against the company to recover the value of their services, and the advances made by them, on the theory that the settlement extinguished and destroyed their lien, and since it was made without their consent was wrongful, subjecting the company to liability for their compensation. Defendant answered admitting the settlement and alleging the payment of the sum of \$75 in full for all injuries received by Haynes, and that the settlement was made in good faith. The answer also alleged that a prior action had been brought by Haynes to recover for the same injuries, through other attorneys, which action is still pending, has not been dismissed or disposed of by trial or otherwise.

Upon the issues thus framed the cause proceeded to trial before the court without a jury. The court found the facts substantially

as here stated. Though the complaint charged that the settlement was made and entered into for the fraudulent purpose of defeating the attorneys out of their compensation, the court made no finding upon the question, and we assume therefore that the settlement was made in good faith and without the wrongful purpose alleged in the complaint. The court further found that the prior action, commenced by other attorneys, was not pleaded as a defense or otherwise in the action brought by these plaintiffs, and concluded that such action was no bar to plaintiffs' right of recovery for services rendered in the second action. The court also found that the value of plaintiffs' services exceeded the sum of \$75, and that they advanced as expenses of the litigation the sum of \$75 and over. As conclusions of law the court found that plaintiffs were entitled to judgment in the sum of \$75 and the costs and disbursements of the action. Judgment was entered accordingly and defendant appealed.

As we understood from the record, it was the contention of plaintiffs in the court below that they were entitled to the reasonable value of their services, regardless of the amount of the settlement, and also to the full amount of the disbursements made by them. The trial court evidently did not sustain this contention; on the contrary the court was of the opinion that plaintiffs' recovery could not exceed the amount of the settlement. The decision of the court has not been challenged by plaintiffs in any respect, and so far as adverse to any of their contentions it is the law of the case. We have, therefore, only to determine the questions raised by defendant. On the theory that the settlement was made in good faith, and without a purpose to defraud the attorneys, the trial court was right in holding that the amount thereof was the basis for the computation of the plaintiffs' recovery, and that under their contract, they could recover no more than one-half thereof. Whether the court was right in holding that they were not entitled to the full amount of advances made, we do not stop to consider. The decision of the trial court is final as to plaintiffs.

We then come to the questions raised by defendant's assignments of error. Defendant contends:

- (1) That plaintiffs cannot maintain an independent action to

recover their compensation or advances made, or to enforce their lien, but are confined to a proceeding in the original action.

(2) That the amount of plaintiffs' compensation is fixed by their contract with Haynes and cannot exceed one-half the settlement, and that the advances must be limited to costs that might properly be taxed in the action.

(3) That plaintiffs can recover nothing by reason of the pendency of the former action brought by another attorney.

1. The first contention goes to the form of procedure in such cases. Heretofore proceedings of this kind have been prosecuted in the original action and such perhaps is the general practice in other states, though it is far from uniform. 2 Ruling Case Law, § 176, p. 1084; 3 Am. & Eng. Enc. (2d ed.) 468; 4 Cyc. 1022. We held in *Weicher v. Cargill*, 86 Minn. 271, 90 N. W. 402, that it was a proper proceeding, though we did not go to the extent of saying that it was exclusive of all other remedies. We are not impressed that the form of procedure in such cases is of serious moment or importance. The lien rights sought to be enforced in the case at bar are given by statute (section 4955, G. S. 1913), and the statute vests in the attorney a legal right to resort to the cause of action, or any settlement thereof without his consent, for his compensation. It is well settled in this state, as well as in all states where the common-law distinction between forms of action has been abolished, that a complaining party may resort to any judicial remedy for the enforcement of his rights, legal or equitable, which is adequate and appropriate to the relief sought. The rule as we understand it extends to all actions or special proceedings, except in those cases where a right, not existing at common law, is created by statute, and a remedy for its enforcement is also provided. In such case the remedy so prescribed is generally held exclusive. 1 Dunnell, Minn. Dig. § 85, et seq; 7 Enc. Pl. & Pr. 362. The statute creating the lien under which plaintiffs claim does not prescribe a remedy for its enforcement, and we think, and so hold, that the attorney in such case may elect whether to proceed by independent action, or in the original suit. *Yonge v. St. Louis Transit Co.* 109 Mo. App. 235, 84 S. W. 184; *Lawson v. Missouri & K. Tel. Co.* 178 Mo.

App. 124, 164 S. W. 138; *Herman Const. Co. v. Wood*, 35 Okla. 103, 128 Pac. 309. Either procedure is adequate, affords all parties an opportunity to be heard, and the same result follows in each.

2. It appearing in this case that the settlement was made in good faith, and without purpose to defraud the attorneys (at least there is no finding of the court to the contrary), we sustain the contention of defendant that the amount of the settlement must be taken as a basis from which to compute the attorneys' fees. Plaintiffs were entitled under their contract with Haynes to one-half the recovery in the action, and the amount of the settlement finally fixes in this case the amount of such recovery. They are therefore entitled as and for their compensation for services rendered to the sum of \$37.50. But this does not necessarily deprive them of the right to be reimbursed for the expenses incurred, which the contract provided should be taken from the recovery before a division between the parties. The company is bound by the terms of the contract in this respect, and the attorneys are entitled to reimbursement for any legitimate expense incurred by them in the prosecution of the action. This is not necessarily limited to taxable items of costs and disbursements, but includes any expenditure which might properly be made in furtherance of the prosecution of the action. Whether the recovery for such disbursements may in any case exceed the amount of the settlement, we do not, for reasons already stated, determine. The compensation and disbursements were in this case so limited by the trial court, and of this plaintiffs are in no position to complain, not having appealed from the judgment. Nor do we consider whether, in cases of this kind, the amount of the settlement is final as to the attorneys' compensation where the settlement was made in fraud of his rights. The question is not here involved. We dispose of the case on the theory that there was no fraud, and that the plaintiff had the right to settle the action without the consent of his attorneys, notwithstanding the stipulation in the contract that he should not do so. *Boogren v. St. Paul City Ry. Co.* 97 Minn. 51, 106 N. W. 104, 3 L.R.A.(N.S.) 379, 114 Am. St. 691; *Desaman v. Butler Bros.* 118 Minn. 198, 136 N. W. 747, Ann. Cas. 1913E, 642.

3. The third contention of defendant, that the pendency of the former action is a bar to the lien rights of the attorneys in the second action, is not sustained. The pendency of that action was not pleaded as a bar to the second action, and the record contains no suggestion that plaintiffs had knowledge thereof when the second action was brought. For aught that appears from the record plaintiffs proceeded in good faith, without notice of the other action, and since they were permitted to so proceed without, by pleading the former action or otherwise, notifying them of its pendency, defendant is in no position to complain that it may possibly be subjected to the payment of two separate liens upon the same cause of action.

Judgment affirmed.

---

ANTON CHERPESKI v. GREAT NORTHERN RAILWAY COMPANY.<sup>1</sup>

February 5, 1915.

Nos. 19,037—(206).

**Federal Employer's Liability Act—question for jury.**

1. Where the plaintiff, a section foreman, was working with others in taking out rails from the main line of an interstate carrier and putting others in their place, loading those taken out onto a flat car near by, and was injured while so loading, it was at least a question for the jury whether he was employed in interstate commerce within the Federal Employer's Liability Act (35 St. 65, c. 149).

**Negligence of fellow servant.**

2. It was a question for the jury whether the plaintiff was injured by the negligence of his fellow servants in raising one end of the rail while loading, without the customary signal, thereby causing the other end to hit him.

**Privilege of physician—error to exclude evidence.**

3. The testimony of physicians making an examination of the plaintiff to ascertain his physical ability to work on a railroad, their information not be-

<sup>1</sup> Reported in 150 N. W. 1091.

ing obtained for the purpose of treating or acting for him, is not privileged, and it was error to exclude it.

Action in the district court for Lyon county to recover \$20,000 for injuries received while in defendant's employ. The case was tried before Olsen, J., who denied defendant's motion for a directed verdict, and a jury which returned a verdict for \$5,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed.

*M. L. Countryman, A. L. Janes and James H. Hall, for appellant.*  
*Tom Davis and Ernest A. Michel, for respondent.*

DIBELL, C.

Action to recover for personal injuries sustained by the plaintiff while in the employ of the defendant. There was a verdict for the plaintiff. The defendant appeals from the order denying its alternative motion for judgment or for a new trial.

The questions are:

(1) Was the plaintiff employed in interstate commerce within the Federal Employer's Liability Act (35 St. 65)?

(2) Does the evidence justify a finding that he was injured by the negligence of his fellow servants while loading a rail, which had been taken out of the track, onto a flat car?

(3) Was the evidence of certain physicians, who were not acting or prescribing for him when they obtained their information, privileged?

1. The plaintiff was a section foreman. He and those working with him were taking out the rails from defendant's main track at Marshall, Minnesota, and replacing them with others. Rails were first taken from the track and put to one side. Others were then put in their places. When this was done the old rails were put on a push car and worked over onto another track and then loaded onto a flat car. What was then their disposition does not appear. The track on which the flat car stood was used for interstate and intrastate traffic. Both interstate and intrastate traffic passed over the main line. The court left it to the jury to find whether the de-

fendant was engaged in interstate commerce and the plaintiff was employed by it therein at the time of his injury. The repair of the roadbed was a work of interstate commerce. That it was found convenient to put the old rails on a flat car, in disposing of them, does not make the work any less a part of interstate commerce work. It was a part of the general work. The next day the men were doing the same kind of work in the same way somewhere else on the line. In *Pedersen v. Delaware, L. & W. R. Co.* 229 U. S. 146, 33 Sup. Ct. 648, 57 L. ed. 1125, Ann. Cas. 1914C, 153, it was held that the Federal Employer's Liability Act applied where an employee was hit and killed by an intrastate car while carrying a pail of bolts with which to repair a bridge carrying both interstate and intrastate traffic. The language of the court in that case reaches the situation presented in the case at bar. It said:

"Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency \* \* \* in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to

the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? \* \* \* Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

"True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.

"The point is made that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one. \* \* \* "

In *Central R. Co. v. Colasurdo*, 192 Fed. 901, 113 C. C. A. 379, a switch repairer was held within the act; in *Zikos v. Oregon R. & N. Co. (C. C.)* 179 Fed. 893, a section hand; in *Horton v. Oregon-Washington R. & N. Co.* 72 Wash. 503, 130 Pac. 897, 47 L.R.A. (N.S.) 8, a pumper riding to his pumping station on a hand car provided by the railroad; and in *St. Louis S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. ed. 1129, Ann. Cas. 1914C, 156, a yard clerk going across the yards to meet an incoming interstate train.

It was at least a question for the jury whether the plaintiff was employed in interstate commerce within the meaning of the Federal Employer's Liability Act; and the trial court submitted the question to the jury.

2. The plaintiff claims that he was injured through the negligence

of his fellow servants in throwing one end of a rail onto the car before the usual notice or warning was given. If he was engaged in interstate commerce the negligence of a fellow servant does not relieve the defendant of liability. The evidence is such that the jury might find that the usual notice was not given; that the rail which was being loaded partially balanced on the side of the car, one end dropping down towards the plaintiff and hitting and injuring him; and that the injury was the result of the negligence of the coservants of the plaintiff.

3. The defendant called Dr. Workman and Dr. Quinn to testify as to the extent of the plaintiff's injuries. Dr. Workman was the physician and surgeon of the Northwestern road residing at Tracy. The defendant proposed showing that the plaintiff went to him and had an examination made for the purpose of ascertaining whether he could enter the service of the road. Dr. Quinn was the general surgeon of the defendant. The plaintiff, according to the offered proof, went to him to ascertain whether he was physically able to remain in the service of the company. In neither case was curative treatment contemplated. In neither case did the physician obtain information to enable him to prescribe or act for the plaintiff. Objections to the proposed testimony were sustained upon the ground that the information sought was privileged.

At common law communications between physician and patient or information obtained by the physician in treating his patient were not privileged. The privilege comes from the statute. Our statute is as follows:

"A licensed physician or surgeon shall not, without the consent of his patient, be allowed to disclose any information which he acquired in attending the patient in a professional capacity, and which was necessary to enable him to act in that capacity." R. L. 1905, § 4660 (G. S. 1913, § 8375).

From the showing made or offered to be made it affirmatively appeared that the information obtained by Dr. Workman and Dr. Quinn was not privileged.

It is suggested that the error in excluding the testimony was without prejudice since there was other evidence of the character

which these physicians would have given. We are unable to see it so. The extent of the plaintiff's injuries was the subject of sharp contest. Presumably the testimony of these physicians would have been helpful. The defendant had the right to have it before the jury. It was error to exclude it.

Order reversed.

---

**CHRIST JOHNSON v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>**

February 5, 1915.

Nos. 19,090—(266).

**Champerty — advances to poor client — soliciting.**

1. It is not against public policy as champerty or maintenance, for an attorney to solicit business, or to advance money to a poor client for his living expenses during litigation, or to advise a client against the settlement of his case.

**Same — deduction of expenses from amount recovered.**

2. An agreement between attorney and client by which the former is to advance money for expenses and is permitted to deduct the amount thereof from the amount recovered, is not against public policy, where it does not appear that it was agreed that the client should not be liable for the expenses in case there was no recovery.

**Same — agreement construed.**

3. Defendant settled a personal injury case with the injured person, agreeing to pay him \$4,500 and to reimburse him for any sum he should be

<sup>1</sup> Reported in 151 N. W. 125.

---

Note.—Upon the right of an attorney at law to solicit business, see notes in 9 L.R.A.(N.S.) 282 and 33 L.R.A.(N.S.) 941.

On the question of the validity of a champertous contract, see note in 12 L.R.A.(N.S.) 606.

As to the basis for computing share of attorney entitled to a certain proportion of recovery, where the suit is compromised for a certain sum and attorney's fee. 22 L.R.A.(N.S.) 776.

compelled to pay his attorneys. Under a contract between the injured person and his attorneys he was to receive two-thirds and they one-third of any amount received in settlement. It is held that this amount was \$4,500 plus the sum the attorneys would be entitled to under their contract, and that the attorneys were entitled to recover of defendant at least \$2,000.

Petition to the district court for Lyon county by John I. Davis, Tom Davis and Ernest A. Michel, attorneys for the plaintiff, to recover from defendant \$2,000, by virtue of defendant's settlement of his cause of action with plaintiff, wherein it agreed to become liable and pay to petitioners all fees or sums legally due to them as such attorneys. The matter was heard before Olsen, J., who made findings and ordered judgment in favor of plaintiffs for the amount demanded. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

*A. L. Janes and M. L. Countryman, for appellant.*

*John I. Davis and Davis & Michel, pro se.*

BUNN, J.

John I. Davis and Davis & Michel were the attorneys for Christ Johnson in an action brought by him against defendant to recover for personal injuries. Before the case came to trial defendant settled with Johnson without the knowledge or consent of his attorneys. The terms of the settlement were these: Defendant agreed to pay Johnson \$4,500 in cash, to reimburse him for any sum he should be compelled to pay his attorneys, to pay all hospital and doctors' bills, and to furnish him free of charge with an artificial leg when he was in condition to use one. The \$4,500 was paid to Johnson, and the suit and cause of action compromised and settled.

The attorneys were employed by Johnson under a contingent fee contract by the terms of which they were to receive for their services 33½ per cent of any amount recovered by settlement or suit. The contract provided that any moneys advanced by the attorneys for expenses were to be deducted from the gross amount received by settlement or suit. It also provided that no settlement was to be made without the consent of Johnson.

This proceeding was by a complaint or petition filed by the attor-

neys, and was entitled in the main action. The petition set forth in detail the contract between Johnson and the petitioners, the commencement of the personal injury action, the settlement thereof, and its terms. Fraud was also alleged. Judgment against defendant for \$2,000 and interest was demanded. Defendant filed an answer to the petition which, after admitting the commencement of the action and the settlement, proceeded to charge that petitioners were and had been for a long time engaged in "the business and conspiracy of unlawfully stirring up strife and contention and vexatious and speculative litigation between this defendant and persons having personal injury claims against this defendant, and in discouraging and preventing the amicable compromise of said claims without litigation;" that petitioners in soliciting and obtaining claims against defendant traveled from place to place and employed for such purpose a large number of laymen as agents and solicitors; that for the purpose of obtaining cases against defendant they have unlawfully paid to claimants large sums of money for the support and maintenance of claimants during the litigation; that they pay all costs and disbursements connected with litigation on the understanding with claimants that the latter, in case there is no recovery, shall not be liable therefor, and that petitioners will reimburse themselves, for the money so advanced, out of the proceeds of the litigation. The answer further charged petitioners with preventing the amicable settlement of claims by advising all claimants that they are entitled to sums of money greatly in excess of the actual damages suffered, thus unlawfully fomenting litigation against defendant. Thus far the charges made were general in their nature, and had no reference to this particular case. The answer then proceeded to allege that petitioners solicited the claim of Johnson, wrongfully persuaded him not to make an amicable settlement, by promising to obtain a recovery largely in excess of compensation, to advance large sums for his living expenses, and to pay all costs and expenses of the litigation, and to reimburse themselves solely out of the amount recovered from defendant. It was alleged that, had it not been for these representations and promises, the claim would have been amicably settled without suit for substan-

tially the amount actually paid; that the unlawful conduct of petitioners "in this case and the whole course of unlawful conduct of the petitioners in soliciting and obtaining personal injury cases against this defendant and other corporations has resulted in constant, needless strife and contention between this defendant and its employees and other claimants, and has resulted in unnecessary vexatious and speculative litigation much to the detriment of this defendant and greatly to the prejudice of justice." In conclusion, the answer alleged that by reason of the unlawful and champertous conduct of petitioners, they have no lien upon the cause of action settled by defendant, and further that their contract with Johnson was null and void, for champerty and maintenance and as against public policy. The reply was a general denial.

The court, on petitioners' motion, made an order vacating the settlement, for the purpose of hearing and determining what fees should be paid by defendant to the attorneys for plaintiff. This matter was heard by the trial court without a jury. After petitioners established their contract with Johnson, the fact of the settlement, and that they had received no compensation, defendant called each of the petitioners for cross-examination, and attempted to prove by him the allegations of its answer. The court sustained objections to practically all questions asked and to numerous offers to prove the facts alleged, and the case was submitted for decision with no evidence in support of the defense. The court subsequently filed its decision finding the facts in favor of petitioners, and that the "other allegations" of the pleadings were untrue, and ordering judgment in favor of the petitioners and against defendant for \$2,000 and interest.

The questions involved are these: (1) Did the court err in excluding the evidence offered by defendant in support of allegations of its answer? (2) Did it err as to the amount petitioners are entitled to recover?

1. As to the ruling in sustaining objections to questions and offers relating to the conduct of petitioners in general, and in other cases, it is clear that these matters were wholly irrelevant to the issue—petitioners' right to a lien in this particular case.

The facts offered to be proved that related to petitioners' conduct in the Johnson case were substantially these: (1) That they solicited Johnson's case; (2) that they paid money to Johnson for his support during the pendency of the litigation; (3) that they advised him not to settle the case.

Is conduct of this kind so against public policy that the courts will deny to attorneys guilty of it their statutory lien on the client's cause of action? We freely concede that champerty or maintenance in a case may be ground for refusing the aid of the court in compelling compensation to the guilty attorneys. But is it champerty or maintenance or against public policy for an attorney to solicit business; to pay money to a poor client for his living expenses during the litigation, or to advise him against a settlement of his case? We may have our individual opinions on these propositions as questions of good taste or legal ethics. But in the absence of some statute we are unable to hold that it is illegal or against public policy for an attorney to solicit a case. See concurring opinion of Justice Cady in *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035. The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything, may in a sense tend to foment litigation by preventing a settlement from necessity, but we are aware of no authority holding that it is against public policy, or of any sound reason why it should be so considered.

It is generally held that a person, whether an attorney or a layman, who furnishes assistance by money or otherwise to a poor man to enable him to carry on an action is not guilty of maintenance. 6 Cyc. 865, and cases cited. *Northwestern S. S. Co. v. Cochran*, 191 Fed. 146, 111 C. C. A. 626. It is not against public policy for an attorney to loan his client money to enable him to carry on the suit. This is the utmost extent to which the offer of evidence went, and it was not error to sustain the objection.

As to the offer to prove that the petitioners advised Johnson against settling the case, representing that he was entitled to heavy damages, we know of no reason why this should be held contrary to public policy. Johnson did not agree not to make a settlement

without the consent of his attorneys; indeed the contract expressly provides that the attorneys shall not settle without his consent. The law favors the amicable settlement of controversies, and it is wrong for a lawyer to discourage settlements out of personal motives. But there was no offer to prove any such conduct in this case; indeed the evidence shows pretty clearly that the petitioners advised and attempted to procure a settlement.

2. Defendants argue that an agreement by an attorney to pay the expenses of litigation and reimburse himself from the proceeds of the action is void. But the contract in this case only provided that the attorneys might retain out of the amount recovered any moneys advanced for expenses. There was no offer to show an oral agreement that the attorneys were to support the litigation at their own expense or to indemnify the client against costs. The argument therefore fails, and the cases cited have no application. As before stated, an agreement to loan the client funds with which to carry on the suit or to maintain himself during its pendency, is not regarded as *per se* opposed to public policy. It is only when the attorneys are to ultimately stand the costs, or when the client is indemnified from liability for them in case of no recovery, that the law declares the arrangement void. *Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806, 64 Am. St. 452; 6 Cyc. 858, 865, and cases cited.

After a careful reading of the record, we find nothing in the evidence excluded that was material—nothing that would have justified the trial court in refusing relief to petitioners. Nothing can be added to what has been said in prior decisions of this court on the subject of champerty and maintenance. *Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806; *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563, 76 Minn. 76, 78 N. W. 1035; *Gammons v. Gulbranson*, 78 Minn. 21, 80 N. W. 779; *Holland v. Sheehan*, 108 Minn. 362, 122 N. W. 1, 23 L.R.A.(N.S.) 510, 17 Ann. Cas. 687. These cases in no way touch the case at bar. There was no illegality in the written contract between Johnson and the petitioners, and no offer to prove any facts that would have made the contract illegal as against public policy.

3. Defendant insists that the amount of the recovery, if peti-

tioners were entitled to anything, should have been \$1,500 instead of \$2,000. This is on the theory that the recovery by Johnson was \$4,500, and that under the contract he would have been liable to his attorneys for but one-third of this sum. But the contract of settlement was that defendant was to pay Johnson \$4,500, and in addition to reimburse him for any sum he should be compelled to pay his attorneys. (We do not add the hospital bills or the wooden leg.) Under the contract between the attorneys and their client, he was to receive two-thirds and they one-third of the amount received or recovered of defendant. The \$4,500 paid to Johnson was his two-thirds of the total settlement. The one-third of the attorneys would be \$2,250. The court allowed \$2,000, which was the sum demanded, and we think that defendant has no ground for complaint. The case of *Schmitz v. South Cov. & Cin. St. Ry. Co.* 131 Ky. 207, 114 S. W. 1197, 18 Ann. Cas. 1114, also reported in 22 L.R.A.(N.S.) 777, does not seem logically sound, and is criticised in the note thereto in L.R.A. The question is somewhat perplexing, but we think it is fairly clear that the total amount of the settlement was not alone the \$4,500 paid to Johnson, but that sum plus the amount he had agreed to pay his attorneys.

Order affirmed.

---

STATE ex rel. MELVINA W. GRAFF and Another v. PROBATE  
COURT OF ST. LOUIS COUNTY and Another.<sup>1</sup>

February 5, 1915.

Nos. 19,100—(295).

**Inheritance tax — construction of reciprocal exemption.**

1. The reciprocal exemption amendment to our inheritance tax law, made

<sup>1</sup> Reported in 150 N. W. 1094.

---

**Note.**—On the question of physical presence or absence of personal property, or evidence thereof, as affecting liability to tax, see note in 46 L.R.A.(N.S.)

in 1911, applies only where the laws of another state impose an inheritance tax upon "transfers of personal property of decedents," but "exempt or do not impose a tax upon transfers of personal property of residents of Minnesota having its situs in such state"; and the laws of another state which impose such tax only where the property passes to collateral relatives or strangers, but do impose such tax where personal property within such state, belonging to residents of Minnesota, passes by will to such collateral relatives or strangers, do not bring the property of residents of that state within such exemption.

**Tax on nonresident's estate.**

2. A nonresident decedent's personal property, having a situs in this state, is subject to the succession tax of this state, although the devolution of such property is governed by the law of the decedent's domicile.

**Construction of inheritance tax.**

3. The language of our statute indicates an intention on the part of the legislature to impose a succession tax in all cases in which it has the power to impose such tax, and the statute cannot be construed as applying only where the devolution of the property is governed by our laws.

**Same — debts due from residents — stock in domestic corporations.**

4. The devolution of debts owed by residents of this state, whether evidenced by promissory notes or not, and of the stock of corporations of this state, and of the stock of national banks located in this state, is subject to a succession tax in this state, although the debts were owing to, and the stock was held by, nonresident decedents.

**Act constitutional.**

5. The inheritance tax statute, as amended, does not infringe the constitutional provision that "no law shall embrace more than one subject, which shall be expressed in its title," nor the equality provisions of the state or Federal Constitution, nor the provision against impairing the obligation of contracts.

Upon the relation of Melvina W. Graff, in person and as executrix of the estate of Edmund D. Graff, deceased, this court issued its writ of *certiorari* directed to the district court for St. Louis county

1167. And as to the liability of a debt due from a resident to a nonresident to succession tax, see note in 4 L.R.A.(N.S.) 953. And for taxation of stock in a domestic corporation belonging to the estate of a nonresident, see notes in 19 L.R.A.(N.S.) 887 and 25 L.R.A.(N.S.) 384.

The question of the constitutionality of succession taxes is treated in notes in 33 L.R.A.(N.S.) 592 and 50 L.R.A.(N.S.) 991.

and Honorable S. W. Gilpin, as judge thereof, to review the proceedings in that court in determining the amount of the inheritance tax due the state of Minnesota from said estate. Writ quashed.

*Lyndon A. Smith*, Attorney General, and *William J. Stevenson*, Assistant Attorney General, for respondents.

*Francis W. Sullivan*, for relators.

*Harlan P. Roberts*, as *amicus curiæ*, filed a brief in behalf of relators.

#### TAYLOR, C.

Edmund D. Graff, a resident of the state of Pennsylvania, died in that state on June 3, 1912, leaving a will by which he gave all his property to his wife, Melvina W. Graff, and in which he designated her as executrix thereof.

The will was admitted to probate in the state of Pennsylvania, and was subsequently admitted to probate in St. Louis county in this state. The inventory filed in the probate court of St. Louis county listed the following property for administration in that court:

Real estate situated within the state of Minnesota of the value of .....	\$84,825
152 shares of capital stock of First National Bank of Duluth, Minnesota, of the value of .....	68,400
25 shares of capital stock of the First State Bank of Tower, Minnesota, of the value of .....	3,500
993 shares of capital stock of Scott-Graff Lumber Co., a Minnesota corporation, of the value of .....	238,320
A promissory note executed by Scott-Graff Lumber Co., of the value of .....	13,702
Book account due from Scott-Graff Lumber Company of the value of .....	80,260
<b>Total .....</b>	<b>\$489,007</b>

On the ground that our laws impose a tax upon the right to succeed to the ownership of the property above mentioned, the attorney general, on behalf of the state, presented a claim for such tax to the

probate court. After an extended hearing, the claim was allowed. Thereupon the administratrix sued out a writ of *certiorari* and brought the matter before this court.

1. Among the amendments made to the inheritance tax law by the legislature of 1911 was the following:

"No tax shall be imposed, however, upon any transfer of personal property within this state owned by a nonresident of this state at the time of his death, where by the laws of the state of the decedent's domicile, an inheritance, succession or transfer tax is imposed on transfers of personal property of decedents, provided the laws of such state exempt or do not impose a tax upon transfers of personal property of residents of Minnesota having its situs in such state." [Laws 1911, p. 278, c. 209, § 2, subd. 2.]

This provision was repealed by the next legislature, but was in force at the time of the death of Mr. Graff, and the relator contends that it exempted the succession to the personal property left by him from taxation under the Minnesota laws, for the reason that Pennsylvania levies a "collateral inheritance tax," as it is termed in the statute of that state, but levies no tax where, as in this case, the property passes to the surviving spouse.

The Pennsylvania statute [see 5 Purdon's Dig. Statutes of Pennsylvania (13th ed.) 5299, 5300] imposes an inheritance tax where the property passes by will or by the intestate laws of that state to collateral relatives or to strangers upon:

"All estates, real, personal and mixed, of every kind whatsoever, situated within this state, whether the person or persons dying seized thereof be domiciled within or out of this state;" but imposes no inheritance tax where the property passes "to or for the use of father, mother, husband, wife, children and lineal descendants born in lawful wedlock, children of a former husband or wife, or the wife or widow of the son of the person dying seized or possessed thereof."

In the case at bar, the entire property passed by will to the widow of the decedent, and is not subject to an inheritance tax under the laws of the state of Pennsylvania whether the domicile of the decedent be in that state or elsewhere. If the situation were

reversed, and the decedent had been a resident of Minnesota and the property had been located in Pennsylvania, it is true, as claimed by the relator, that no tax upon the succession would be collected in Pennsylvania; but the reason why such tax would not be collected is because Pennsylvania has no law imposing a tax upon property which passes to the surviving spouse, and not because the decedent was a resident of Minnesota. The statute of Pennsylvania exacts no tax from property which passes to the surviving spouse or to near relatives of the decedent, but exacts a tax from all property which passes by will to remote relatives or to strangers, "whether the person or persons dying seized thereof be domiciled within or out of this state." The Pennsylvania courts apparently hold that the inheritance tax of that state is a tax upon the property itself, and not upon the right of succession thereto. *Coleman's Estate*, 159 Pa. St. 231, 28 Atl. 137; *Bittinger's Estate*, 129 Pa. St. 338, 18 Atl. 132. They also hold that the fiction that the situs of personal property follows the domicile of the owner, ordinarily obtains; and that

"As a general rule, intangible personal property of a nonresident, such as bonds, mortgages and other choses in action, is governed, as to its situs, by the fiction of law above noticed, and hence such property is not subject to collateral inheritance taxation under our laws, because it is not 'situated within this state.'" *Small's Estate*, 151 Pa. St. 1, 25 Atl. 23.

Where they hold that the situs of the property is not in Pennsylvania, they of course hold that it is not taxable there. *Countess de Noailles' Estate*, 236 Pa. St. 213, 84 Atl. 665, 46 L.R.A.(N.S.) 1167; *Shoenberger's Estate*, 221 Pa. St. 112, 70 Atl. 579, 19 L.R.A.(N.S.) 290, 128 Am. St. 737. But they also hold that the personal property of nonresidents may acquire a situs in Pennsylvania and become subject to the inheritance tax of that state. In *Small's Estate*, 151 Pa. St. 1, 25 Atl. 23, the decedent, a resident of Maryland, was a member of a limited partnership which conducted a mercantile business in Pennsylvania. The court held that the Pennsylvania law exacted an inheritance tax upon his interest in such part-

nership, and in support thereof quoted the following from the New York court:

"The fiction or maxim, *mobilia personam sequuntur*, is by no means of universal application. Like other fictions, it has its special uses. It may be resorted to when convenience and justice requires. In other circumstances, the truth and not the fiction affords, as it plainly ought to afford, the rule of action. \* \* \* I can think of no more just and appropriate exercise of the sovereignty of a state or nation over property situated within it and protected by its laws, than to compel it to contribute toward the maintenance of government and law."

In Lewis' Estate, 203 Pa. St. 211, 52 Atl. 205, the decedent was a resident of New York. The property in Pennsylvania consisted of stocks, bonds, mortgages, and other evidences of indebtedness, and of cash. It had been invested and re-invested in Pennsylvania for many years, and was being administered by the orphans' court of Pennsylvania. The court held that the law now under consideration subjected it to an inheritance tax in Pennsylvania.

The Pennsylvania statute divides those who succeed to the property of decedents by will into two classes according to the relationship which they bear to the decedent. It imposes no inheritance tax where the property passes to those who are within one class, but does impose such tax where it passes to those who are within the other class, and imposes such tax whether the decedent "be domiciled within or out of the state."

The right of succession to personal property having a situs in Minnesota is exempt from the Minnesota tax, only in case the property belonged to a deceased resident of another state, and the laws of such state impose an inheritance tax upon "transfers of personal property of decedents," but "exempt or do not impose a tax upon transfers of personal property of residents of Minnesota having its situs in such state." Our statute evinces the intention of the legislature to tax the devolution of property in all cases; but, in order to avoid double taxation in those cases where the decedent is in one jurisdiction and the property in another, it inserted the

reciprocal provision that if another state imposed such tax, but exempted therefrom personal property within that state belonging to citizens of Minnesota, Minnesota would also exempt from its tax personal property within its jurisdiction belonging to citizens of such other state. Two things are necessary to bring the residents of the foreign state within the exemption granted by our law—such state must in fact collect a succession tax, and it must not collect such tax from personal property within its jurisdiction belonging to citizens of Minnesota. If the foreign state either does not collect such tax upon the transfer of property belonging to its own citizens, or does collect it upon the transfer of personal property belonging to citizens of Minnesota, the exemption does not apply. The intention is manifest to tax all such transfers of property within our jurisdiction not taxed elsewhere, and also to tax all such transfers, in fact taxed elsewhere, unless the state imposing such other tax relieves therefrom personal property of deceased residents of Minnesota within its jurisdiction. Our statute exacts a tax upon the devolution of all property, but provides for avoiding double taxation in those cases where the other state concerned takes similar action. Where the other state divides such transfers into two general classes and imposes such a tax upon one class and not upon the other, we cannot hold that the class not taxed is within our exemption law. It is the plain purpose of the law to tax all such transfers not taxed elsewhere. But, if we concede that “a transfer tax is imposed on transfers of personal property of decedents,” by Pennsylvania, within the meaning of our exemption statute, still such transfers of property having a situs in Minnesota and belonging to residents of Pennsylvania are not exempt from our tax, for the reason that Pennsylvania exacts a tax upon transfers by will to collateral legatees “of personal property of residents of Minnesota having its situs in such state.” The fact that the domicile of the decedent is in Minnesota does not relieve the personal property of which he died possessed from the Pennsylvania tax; and our exemption statute applies only in case the foreign state collects no inheritance tax from the personal property of deceased residents of Minnesota. The Pennsylvania statute contains no reciprocal pro-

visions, and does not bring the property of residents of that state within the reciprocal exemption provision of our statute.

It is urged that the provision of the Minnesota statute which we have been considering is unconstitutional and void; but, as it does not apply in the present case, and has been repealed, a consideration of that question is unnecessary.

2. The relator contends that, as the Minnesota tax is not imposed upon the property itself but upon the right of succession thereto, and as the right of succession to personal property is determined and fixed by the law of the decedent's domicile, the transfer in question is not subject to taxation in Minnesota, for the reason that the right sought to be taxed is not given or created by the law of Minnesota. This question has been considered by the courts many times, and it is now well settled that personal property of a non-resident decedent may be subjected to a succession tax by the state in which such property has a situs, notwithstanding the fact that the decedent may never have been a resident of that state and that the devolution of his property is governed by the law of his domicile. The authorities are collected in a note found in 46 L.R.A.(N.S.) 1167.

3. The relator's contention that our statute should be construed as imposing a succession tax in those cases only in which the title to the property passes from the decedent to the recipient by virtue of our laws, and hence as not imposing such tax upon the devolution of the personal property of nonresidents, cannot be sustained. The statute<sup>2</sup> provides:

"A tax shall be and is hereby imposed upon any transfer of property, real, personal or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association or corporation, \* \* \* in the following cases:

"(1) When the transfer is by will or by the intestate laws of this state from any person dying possessed of the property while a resident of the state.

"(2) When a transfer is by will or intestate law, of property within the state or within its jurisdiction and the decedent was a non-resident of the state at the time of his death."

<sup>2</sup> [Laws 1911, p. 516, c. 372.]

There are several other provisions, too lengthy to quote, bearing upon the question, and the statute, taken as a whole, leaves no room for doubt that the legislature intended to, and did, impose a tax upon the right of succession to the personal property of nonresident decedents, in all cases in which such property is within this state, or subject to the laws of this state. *State v. Probate Court of County of Ramsey*, 124 Minn. 508, 145 N. W. 390, 50 L.R.A.(N.S.) 262.

4. The relator contends that the property in question is not within the state of Minnesota, nor subject to the laws of Minnesota; that it has its situs at the domicile of the decedent in the state of Pennsylvania; and that the devolution of the property is governed by the law of Pennsylvania and cannot be subjected to an inheritance tax in Minnesota.

It is usually true that the right to succeed to the ownership of the personal property of a decedent is governed by the law of the domicile of the decedent, and is subject to taxation at the place of such domicile; yet, if the one who succeeds to such ownership must invoke the law of another state before he can reduce such property to possession, or secure the beneficial enjoyment thereof, it is generally, although not universally, held that such other state also has power to exact a tax upon the privilege of taking over and securing the beneficial enjoyment of such property. *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439; *Eidman v. Martinez*, 184 U. S. 578, 22 Sup. Ct. 515, 46 L. ed. 697; *State v. Probate Court of County of Ramsey*, 124 Minn. 508, 145 N. W. 390, 30 L.R.A.(N.S.) 262; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82, 3 L.R.A. 372; *State v. District Court*, 41 Mont. 357, 109 Pac. 438; *Matter of Houdayer*, 150 N. Y. 37, 44 N. E. 718, 34 L.R.A. 235, 55 Am. St. 642; *Alvany v. Powell*, 55 N. C. 51.

The right to succeed to the ownership of debts is taxable by the state having jurisdiction of the debtor, for the law of that state furnishes the means to compel payment. *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *State v. Dalrymple*, 70 Md. 294, 17 Atl.

82, 3 L.R.A. 372; *Matter of Houdayer*, 150 N. Y. 37, 44 N. E. 718, 34 L.R.A. 235, 55 Am. St. 642; *Re Daly's Estate*, 91 N. Y. Supp. 858, affirmed 182 N. Y. 524, 74 N. E. 1116; *Re Joyslin's Estate*, 76 Vt. 88, 56 Atl. 281; *Gregory v. Lansing*, 115 Minn. 73, 131 N. W. 1010.

The state which creates a domestic corporation has the power to tax transfers of the stock of such corporation held by nonresident decedents. *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *Moody v. Shaw*, 173 Mass. 375, 53 N. E. 891; *Kingsbury v. Chapin*, 196 Mass. 533, 82 N. E. 700, 13 Ann. Cas. 738; *Re Culver*, 145 Iowa, 1, 123 N. W. 743, 25 L.R.A.(N.S.) 384; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *Dixon v. Russell*, 78 N. J. Law, 296, 73 Atl. 51; *Matter of Whiting*, 150 N. Y. 27, 44 N. E. 715, 34 L.R.A. 232, 55 Am. St. 640; *Gardiner v. Carter*, 74 N. H. 507, 69 Atl. 939; *Douglas County v. Kountze*, 84 Neb. 506, 121 N. W. 593.

The right of succession to stock in a national bank is taxable by the state in which the bank is located, although the stock belonged to a nonresident. *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *Moody v. Shaw*, 173 Mass. 375, 53 N. E. 891; *Re Stanton's Estate*, 142 Mich. 491, 105 N. W. 1122; *Re Cushing's Estate*, 40 Misc. 505, 82 N. Y. Supp. 795; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82, 3 L.R.A. 372.

Whether the right of succession to promissory notes held by non-residents is taxable by the state having jurisdiction over the maker does not appear to have received much attention from the courts. But it is difficult to see why the reasoning which establishes the right to tax the transfer of an ordinary debt does not also establish the right to tax the transfer of a promissory note which is merely an evidence of debt. In the *Matter of Houdayer*, 150 N. Y. 37, 44 N. E. 718, 34 L.R.A. 235, 55 Am. St. 642, the court states the ground upon which such taxation rests as follows:

"Where the right, whatever it may be, has a money value and can be owned and transferred, but cannot be enforced or converted into money against the will of the person owing the right without coming into this state, it is property within this state for the purposes of a succession tax. Thus the right in question is property, because

it is capable of being owned and transferred. It is within this state, because the owner must come here to get it. It is subject to taxation, because it is under the control of our laws."

In *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439, the court say:

"It is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. \* \* \* What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay. \* \* \* Power over the person of the debtor confers jurisdiction, we repeat. And this being so we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death. The maxim *mobilia sequuntur personam* has no more truth in the one case than in the other. When logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way."

The tax in question is not a tax upon property but a tax upon the right of succession thereto, and it is well settled that the rules which determine the situs of personal property for purposes of ordinary taxation are not decisive of its situs for the purpose of a succession tax. The state has undoubted power to impose a succession tax in respect to all property upon which it has power to impose an ordinary tax, and, in addition thereto, it has power to impose a succession tax in respect to certain sorts of intangible property upon which it cannot impose such ordinary tax. While there are decisions to the contrary, it is fairly well settled that debts evidenced by promissory notes are assets at the domicile of the debtor, and are sufficient to confer jurisdiction for administration purposes upon the courts of such domicile. The Supreme Court of the United States say:

"The general rule of law is well settled, that for the purpose of founding administration all simple contract debts are assets at the domicile of the debtor; and that the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the

nature of the debt, but is merely evidence of it, and therefore the debt is assets where the debtor lives, without regard to the place where the instrument is found or payable."

Wyman v. Halstead, 109 U. S. 654, 3 Sup. Ct. 417, 27 L. ed. 1068; Buck v. Beach, 206 U. S. 392, 27 Sup. Ct. 717, 51 L. ed. 1106, 11 Ann. Cas. 732; Wheeler v. Sohmer, 233 U. S. 434, 34 Sup. Ct. 607, 58 L. ed. 1030; Moore v. Jordan, 36 Kan. 271, 13 Pac. 337, 59 Am. Rep. 550. Where the courts of the debtor's domicile have jurisdiction of the debt for purposes of probate administration, it goes without saying that they have jurisdiction for the purpose of enforcing a succession tax.

It is said that bonds and commercial paper are something more than mere evidences of indebtedness, and it has been held that they may be subjected to a succession tax by the state within whose jurisdiction they are found, although neither the debtor nor the creditor are residents of such state; and this is perhaps true, but, if so, it does not divest the state having jurisdiction of the debtor of any power possessed by such state to enforce its own tax. It is unquestioned that the right to succeed to the ownership of the property of a decedent ought not to be burdened with a double tax, but it is equally unquestioned that, under some circumstances, both the state where the decedent resided and the state where his property is located, or his debtor resides, have power to impose such tax. Where the power exists, the extent to which it shall be exercised rests exclusively with the legislature. The determination of such questions is outside the domain of the courts. The case at bar involves no question of double taxation, however, for the tax now under consideration is the only tax sought to be imposed.

The relator must invoke the law of Minnesota to obtain the possession and beneficial enjoyment of the property in question. This is true as to all the sorts of property here involved, and we are of the opinion that the state has power, in respect to all such property, to tax the right to succeed to the ownership thereof. We are also of opinion that the following language of the Massachusetts court,

in respect to the statute of that state, applies with equal force to the statute of this state:

"The language of the taxing statute indicates 'an intention on the part of the legislature to tax all property that it has the power to tax. The statute is as broad as the jurisdiction of the Commonwealth.'" *Peabody v. Treasurer and Receiver General*, 215 Mass. 129, 102 N. E. 435.

5. The relator contends that the amendments of 1911 changed the character of the original law to such an extent that the subject of the law as it now exists is not expressed in its title, and that it is now unconstitutional for that reason. Conceding without deciding that an amendment to a statute may bring it within the constitutional inhibition that "no law shall embrace more than one subject, which shall be expressed in its title," we think that all the provisions now in the statute could have been incorporated therein at the time of its enactment without violating this section of the Constitution. The rule for determining whether a statute violates this provision is tersely stated in *State v. Brooks-Scanlon Lumber Co.* *supra*, page 300, 150 N. W. 912. The other constitutional questions raised are determined against the contention of the relator by the cases of *State v. Bazille*, 97 Minn. 11, 106 N. W. 93, 6 L.R.A.(N.S.) 732, 7 Ann. Cas. 1056; *State v. Probate Court of Hennepin County*, 112 Minn. 279, 128 N. W. 18; *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439; *Wheeler v. Sohmer*, 233 U. S. 434, 34 Sup. Ct. 607, 58 L. ed. 1030.

We are informed that cases involving the right to impose a succession tax upon the devolution of other sorts of property are soon to be submitted to this court, and that the parties interested therein desire to be heard before a determination is reached in respect to such matters. For this reason we have endeavored in the present case to confine ourselves closely to the questions actually presented for decision.

Writ quashed.

STATE ex rel. ST. PAUL CITY RAILWAY COMPANY v.  
MINNESOTA TAX COMMISSION.<sup>1</sup>

February 5, 1915.

No. 19,135—(298).

**Taxation — assessment of street railway personal property.**

1. Under Laws 1913, c. 483, classifying property for purposes of taxation, relator's street railway tracks, overhead feed and trolley wires, trolley poles and underground conduits and cables, are assessable under class 4 at 40 per cent of true value, this class including property not enumerated in the first three; and such property does not come within "tools, implements and machinery whether fixtures or otherwise" included in class 3 and assessable at 33½ per cent of true value.

**Constitution — classification in 1913 act.**

2. Under the Constitution the classification for taxation purposes must be reasonable and such as is based on essential differences; and the differences between the relator's property and that included in class 3 are such as to justify the legislature in making the classification and it is not unconstitutional.

Upon the relation of the St. Paul City Railway Co. this court issued its writ of *certiorari* directed to J. G. Armson, Samuel Lord and O. M. Hall, as the Minnesota Tax Commission, to review and correct the proceedings of said commission in the matter of assessment for taxation of the personal property of St. Paul City Railway Co. under Laws 1913, c. 483. Writ quashed.

*Koon, Whelan & Hempstead*, for relator.

*Lyndon A. Smith*, Attorney General, *William J. Stevenson*, Assistant Attorney General, and *P. J. Ryan*, Assistant County Attorney, for respondents.

DIBELL, C.

Writ of *certiorari* issued from this court to review the proceedings of the Minnesota Tax Commission in the matter of the assessment

<sup>1</sup> Reported in 150 N. W. 1087.

of certain personal property of the relator, St. Paul City Railway Co. The commission made its return to the writ upon which a hearing was had in this court.

1. By Laws 1913, p. 710, c. 483, property for the purpose of taxation is classified. Class 1 includes iron ore and is assessed at 50 per cent of its true value. Class 2 includes household goods and personal belongings and is assessed at 25 per cent of its true value. Class 3 includes live stock, agricultural products, stocks of merchandise with the furniture and fixtures used therewith, manufacturers' materials and manufactured articles, and "all tools, implements and machinery whether fixtures or otherwise," unplatted real estate, etc., and is assessed at  $33\frac{1}{3}$  per cent of its true value. Class 4 includes all property not included in classes 1, 2 and 3 and is assessed at 40 per cent of its true value.

The question is whether the relator's railroad tracks, its overhead feed wires and trolley wires, its trolley poles, and its underground conduits and cables are within class 3 or class 4. The commission put them in class 4, assessable at 40 per cent of the true value. The relator claims that they are within the description of "tools, implements and machinery whether fixtures or otherwise," and should be in class 3 and assessed at  $33\frac{1}{3}$  per cent of true value.

Within the meaning of the act of 1913 none of this property comes within the designation of "tools, implements and machinery whether fixtures or otherwise," as used in class 3. A very liberal construction would not put street railroad tracks, feed and trolley wires, trolley poles, conduits and cables within the classification sought. It is not a doubtful question.

2. The relator claims that if the property mentioned is included in class 4 the classification is so arbitrary and unreasonable that the statute is unconstitutional.

At the November, 1906, election the Constitution was amended by striking out the provisions therein relative to a uniform valuation throughout the state on a cash basis, and inserting a provision to this effect: "Taxes shall be uniform upon the same class of subjects." Const. art. 9, § 1. The effect of this amendment is not to remove all limitation upon the classification of subjects of taxation. The

classification must be a reasonable one and such as essential differences suggest. *Mutual Benefit Life Ins. Co. v. County of Martin*, 104 Minn. 179, 116 N. W. 572. Thus, recognizing that the classification must be reasonable and based on differences suggesting its propriety, it was held that the classification of money and credits for the purpose of taxation, putting upon them a specific annual tax, was within legislative discretion and not unconstitutional. *State v. Minnesota Tax Commission*, 117 Minn. 159, 134 N. W. 643.

The subject of classification for the purpose of taxation is treated at some length in *Citizens Telephone Co. v. Fuller*, 229 U. S. 322, 33 Sup. Ct. 833, 57 L. ed. 1206. In referring to the cases, cited as illustrative, the court says:

"They illustrate the power of the legislature of the state over the subjects of taxation and the range of discrimination which may be exercised in classifying those subjects when not obviously exercised in a spirit of prejudice and favoritism. \* \* \* Granting the power of classification, we must grant Government the right to select the differences upon which the classification shall be based, and they need not be great or conspicuous. \* \* \* The state is not bound by any rigid equality. This is the rule; its limitation is that it must not be exercised in 'clear and hostile discriminations between particular persons and classes.'"

We have no difficulty in reaching the conclusion that the differences between the property involved in the assessment and that included in class 3 are such as to justify the legislature in separating them into the two classes and providing for their assessment upon the percentage basis adopted.

The tax commission was right.

Writ quashed.

ARCHIE VALLEY v. CROOKSTON LUMBER COMPANY  
and Another.<sup>1</sup>

February 11, 1915.

Nos. 18,994—(221).

**Compromise and settlement—cause of action.**

1. Opinions expressed by one contracting party to another upon doubtful questions of law, arising in the course of compromise of a disputed claim, are not actionable representations even though the person giving the opinion be an attorney at law.

**Same—rescission for fraud.**

2. A party to a compromise cannot rescind it for fraud where he knowingly and voluntarily uses and enjoys the fruits of the compromise after being fully advised of the facts. This the plaintiff in this case did, and judgment should be given for defendant.

Action in the district court for Polk county against Crookston Lumber Co. and Robert Mitchell to recover \$15,000 for personal injuries. The case was tried before Watts, J., who at the close of the testimony denied separate motions of defendants to dismiss the action as to each, and separate motions to direct verdicts in favor of each, and a jury which returned a verdict for \$1,150 in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendants appealed. Reversed and judgment ordered for defendant.

*Powell & Simpson, E. E. McDonald, E. O. Hagen, and Ernest C. Carman*, for appellants.

*W. E. Rowe*, for respondent.

HALLAM, J.

Plaintiff was injured by being thrown from a portable water tank while in the employ of the defendant lumber company. The injury was a fracture of the left thigh. The broken bone did not

<sup>1</sup> Reported in 151 N. W. 137.

properly heal or unite, and the result was a shortening of the leg about four inches and for a long time an open wound upon the leg. Plaintiff was in a hospital at Bemidji under the care of his physician, Dr. Marcum, from the time of his injury, December 3, 1911, until August 26, 1912. After he left the hospital on this day he was asked to meet the attorney for defendants. He did so and made a settlement of his claim for \$1,350, received the amount, and in writing released defendants from all liability. He had previously, on the same day, been given \$50 by defendant company to go to St. Paul to buy an extension foot. Notwithstanding this settlement he brought this action for damages and recovered a verdict. Defendants appeal. The question of defendants' original liability was a doubtful question, but we believe that under the evidence it was for the jury to determine. The one question we need consider is whether plaintiff is bound by the settlement he made of his claim. He seeks to avoid the settlement on the ground of fraud. His claim is that the attorney for defendants in order to procure his assent to the settlement made the following representations: "He said he had talked to Dr. Marcum, and he said the doctor had told him that in the course of two or three months I would be strong, pretty near as ever, only I couldn't do as heavy work," and that the attorney also said: "Furthermore I have investigated into your case with the Crookston Lumber Company, and I see you have no case against the Crookston Lumber Company." Defendants' attorney denies making any such statements, but as this denial raises only a question of fact, we are bound on this appeal to assume that the statements were made.

1. The trial court properly disregarded the second alleged representation. This was plainly nothing more than an opinion expressed by one party to a negotiation upon a doubtful question of law. It is true, the statement was alleged to have been made by an attorney at law, but he was the attorney for the other party to the negotiation and there was no relation of dependence or confidence existing between them. There is nothing to indicate that the statement was made in bad faith. As a rule representations to be actionable must be of fact and not mere matter of opinion as to legal right.

Opinions expressed by one contracting party to the other upon doubtful questions of law are not actionable even though the person giving them be an attorney at law. *Dundee Chemical Works v. Connor*, 46 N. J. Eq. 576, 582, 20 Atl. 500; see also *Ætna Ins. Co. v. Reed*, 33 Oh. St. 283. A party may compromise a disputed claim asserted against him without admitting his liability thereon, and he is not to be charged with fraud because in the negotiation leading up to the compromise he denies that liability in fact exists.

2. We come then to the alleged representation as to what plaintiff's doctor had said. It is a little hard to conceive that plaintiff could have relied upon this statement if it was made to him. He knew that his leg was shortened and that it would never become longer. He had been in almost daily contact with his doctor at the hospital and had been treated by him the very day of the settlement. It seems a little strange that he should, under these circumstances, take the doctor's opinion second hand. It is in evidence, but denied by him, that he had discussed the question of settlement with Dr. Marcum before settlement was made. It is in evidence, and not denied, that within a few days after the settlement he discussed the settlement with Dr. Marcum and thought he ought to have had a little more.

But the fact that we consider conclusive against the plaintiff is the fact that after the truth or falsity of the alleged representation must have been apparent to him he spent the major part of the money that he had received on the settlement. We must bear in mind that the essence of the alleged representation was a statement that the doctor said plaintiff would be "strong, pretty near as ever, in the course of two or three months." This was August 26. After the expiration of more than two months, and on October 29, plaintiff deposited in the bank of Crookston \$925 of this money. He then proceeded to check it out and use it little by little for a period of nearly five months, and after it was substantially all gone he then undertook to repudiate the compromise under which he had received it, and commenced this suit. This conduct on plaintiff's part after discovery of the facts constituted a conclusive ratification by him

of the settlement he had made. Ordinarily a party cannot rescind a contract or release for fraud without returning the consideration he has received. This rule has been relaxed in some cases in the interest of substantial justice. *Marple v. Minneapolis & St. Louis R. Co.* 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912D, 1082; *Rase v. Minneapolis, St. P. & S. S. M. Ry. Co.* 118 Minn. 437, 137 N. W. 176; but it is quite well settled that where a party, after knowledge of the facts upon which his claim of rescission of his compromise is based, knowingly and voluntarily uses and enjoys the fruits of the compromise and puts it out of his power to restore what he has received, he affirms his contract and puts himself beyond the power of rescission. The amount received was substantial. Plaintiff could not, after knowledge of the facts, spend the money which he should return in order to disaffirm, and when all was spent avoid his contract and demand more. *Maki v. St. Luke's Hospital Assn.* 122 Minn. 444, 142 N. W. 705. The case is similar to that of *Chicago, St. P. & K. C. Ry. Co. v. Pierce*, 64 Fed. 293, 12 C. C. A. 110, except that in that case there was an issue as to whether the plaintiff spent the money that she had received, understandingly. On appeal it was held that the court erred in refusing to instruct the jury that if she spent the money with knowledge of the settlement, that would ratify the settlement, and that such ratification once made would be final and binding. Bunn, J., said, "If she once affirmed the contract by knowingly and voluntarily spending the money she had received, she could not afterwards elect to disaffirm it \* \* \* the plaintiff could not play fast and loose with the contract of settlement, affirming it today and disaffirming it tomorrow."

Judgment should be given for the defendant.

CLARA S. TWITCHELL v. JAMES F. CUMMINGS.<sup>1</sup>

February 11, 1915.

Nos. 18,995—(219).

**Temporary injunction — reversal on appeal.**

This court will not interfere with the action of the trial court in granting or refusing a temporary injunction, where the evidence as to the facts is conflicting and no irreparable injury impends.

Action in the district court for Hennepin county to cancel and rescind certain leases for the removal of sand and gravel from premises belonging to plaintiff, to enjoin defendant from removing sand and gravel, and from retaining possession of the premises for that purpose, and for \$1,650 damages. From an order, Waite, J., granting defendant's motion to vacate a temporary injunction, plaintiff appealed. Affirmed.

*Selover, Schultz & Selover*, for appellant.

*A. E. Helmick*, for respondent.

TAYLOR, C.

Plaintiff appealed from an order dissolving a temporary injunction, and the sole question for decision is whether she established such a clear right to the injunction that the trial court exceeded its judicial discretion in vacating it.

Plaintiff leased five lots in the city of Minneapolis to defendant for the purpose of removing sand and gravel therefrom, in consideration of specified payments to be made by defendant. She brought this action to cancel the leases and to enjoin defendant from removing any more sand or gravel from the lots on the ground that he had defaulted in his payments, that he had failed to remove waste material as required by the contract, and that he was insolvent. A temporary injunction was granted without prejudice to the right

<sup>1</sup> Reported in 151 N. W. 139.

to move to vacate it. Soon thereafter, upon the motion of defendant based upon his answer and certain supporting affidavits, the court made the order from which the appeal is taken. The facts asserted by plaintiff are denied by defendant, and the case falls within the well-established rule that this court will not interfere with the action of the trial court in granting or refusing a temporary injunction, where the evidence as to the facts is conflicting and no irreparable injury impends. A statement of the rule and a reference to many cases applying it will be found in *Minneapolis Gas-light Co. v. City of Minneapolis*, 123 Minn. 231, 143 N. W. 728.

Order affirmed.

---

A. D. GRAY and Others v. FRANK A. BEMIS.<sup>1</sup>

February 11, 1915.

Nos. 19,006—(229).

**Contract with client construed.**

Plaintiffs performed legal services for defendant under a contract between them which provided that plaintiffs should receive for their services 30 per cent of any recovery made in proceedings brought that resulted in setting aside the will of defendant's father *in toto*, or annulling *in toto* trusts created by the will. The contract is construed and it is *held*:

(1) The parties contemplated not only a recovery that was available to defendant immediately on the close of the litigation, but also a recovery secured but not available to defendant until the termination of a trust by the death of the *cestui que trust*.

(2) Plaintiffs fully performed the contract and earned the agreed compensation, although the will was not set aside "*in toto*," or the trusts annulled "*in toto*."

(3) The contract was not void for champerty.

Action in the district court for Fillmore county to recover \$1,568.63 for legal services. From an order Kingsley, J., dismissing the

<sup>1</sup> Reported in 151 N. W. 135.

action upon the merits, plaintiffs appealed. Reversed with direction to grant judgment for plaintiffs.

*Gray & Thompson and John W. Hopp, pro se.*

*Bert W. Eaton, for respondent.*

BUNN, J.

This action was brought by plaintiffs, who are practicing attorneys of this state, to recover for legal services rendered to defendant. The trial court granted judgment for defendant on the pleadings and plaintiffs appealed.

The complaint and answer fully set forth the facts. There was no reply, and no issues of fact were made. Both plaintiffs and defendant moved for judgment on the pleadings, and if defendant was not entitled to judgment, plaintiffs were. The admitted facts are as follows:

Levi Bemis died August 10, 1910, leaving a will, the provisions of which are set forth in *Bemis v. Northwestern Trust Co.* 117 Minn. 409, 135 N. W. 1124. He left a widow and four sons, Victor E., Harry L., Frank A. (the defendant here) and Willie E. The will gave \$30,000 to the widow, and the same amount absolutely to the son Victor E. As provision for Harry L. the testator gave in trust to the St. Paul Trust Co. the sum of \$25,000, to pay the net annual income to Harry L. during his life, and at his death to divide the principal as follows: One third to the grandchildren of the testator, two thirds to the trustees of the "Levi Bemis Home for the Aged." Similar provisions were made for Frank A. and Willie E. except that the principal sum in their trusts was \$30,000. After bequeathing \$5,000 to the Chatfield Cemetery Association, the testator gave to trustees \$75,000 to build, maintain and endow a home for the aged, to be known as "The Levi Bemis Home for the Aged." He also gave to these trustees the residue of his estate.

The sons Frank A. and Willie E. contested the will. They retained the plaintiffs. A written contract was signed by plaintiffs and by Willie E. and sent by plaintiffs to Frank, who was then in Oregon. This contract provided that plaintiffs were to prosecute an action to determine the validity of the trusts created by the will, and

were to receive as compensation 30 per cent of all moneys recovered or received in settlement, and to receive nothing if nothing was recovered. Frank objected to the contract, interpreting it as entitling the attorneys to 30 per cent of any income collected from the trust company, but expressing his willingness to pay attorneys to "break the will along the line of proving the nonvalidity of the trust," and saying that he would not object to 30 per cent should he receive what would come to him had there been no will, "or about that amount." Plaintiffs answered explaining that they would make no charge whatever if they did not succeed in securing for him benefits outside the trusts created for him in the will, and saying that "the substance of the contract is that you are to pay us 30 per cent of any recovery made in proceedings resulting in setting aside the will *in toto* or in annulling the trusts *in toto*, or of any amount paid in the way of a compromise." Frank replied to this letter, expressing his pleasure that plaintiffs did not intend to "charge 30 per cent of our annual income," and saying: "I will sign a contract, or you can accept this letter as a contract, as follows: I will give you 30 per cent of any recovery made in proceedings that you bring, resulting in setting aside the will *in toto* or in annulling the trusts *in toto*, or of any amount paid in the way of a compromise, such compromise to be acceptable to you, W. E. and me. It is understood that this does not include the sum to be left with the N. W. Trust Co., or annual income from it, should this part of the will stand. Such proceedings to be along the line of proving the illegality of the proposed trusts, or other line acceptable to you, W. E. and me, and if no recovery is made, then we (W. E. and I) are to be at no expense whatsoever." This was apparently satisfactory to plaintiffs, who proceeded to institute and carry to a successful conclusion the contest which culminated in the decision of this court in *Bemis v. Northwestern Trust Co. supra*. By that decision the bequests in trust for the home for the aged were declared void, and this included the bequests to the home of two thirds of the corpus or principal of the three trusts for the sons. As to this part of his estate, the testator died intestate. These three trusts were held valid in so far as concerned the payment of the income to the beneficiaries during their

lives, and as to the bequest of one third of the principal sums to the grandchildren, and the invalid provisions were held not to make the entire will invalid.

Harry L. Bemis died intestate August 11, 1913, leaving no wife or child, or children of a deceased child. Upon his death the sole heirs of Levi Bemis were the defendant Frank A. Bemis, Victor E. and Willie E. Bemis. The trust company made application to the district court of Ramsey county for a settlement of its account as trustee, and for an order of distribution of the trust fund. After a hearing the fund, then amounting to \$24,774.73 was ordered distributed, one third to the grandchildren of Levi Bemis, the balance in equal shares to Frank A. (defendant here), Victor E., Willie E., and the administrator of the estate of Harry L. The sum thus received by defendant was \$4,129.12. In this action plaintiffs seek to recover 30 per cent of this sum under their contract with the defendant before set out.

The ground upon which the trial court held that plaintiffs were not entitled to recover does not appear. Defendant urges three reasons for sustaining the decision: (1) The parties contemplated by their contract only a recovery or a result that was available to defendant immediately on the close of the litigation, and not a result that became available to defendant at a future time; (2) plaintiffs did not perform their part of the contract, in that the will and the trusts were not set aside *in toto*; (3) the contract was champertous. We will consider these questions in the order stated.

1. It is clear that the money came to defendant as the result of the litigation conducted by plaintiffs. Had it not been for the contest, two-thirds of the principal of the Harry L. Bemis trust fund would have gone on his death to the home for the aged, instead of to the heirs of Levi Bemis, and defendant would have received nothing. It seems to us that plaintiffs' right to a recovery of 30 per cent of this fund rests on exactly the same basis as does their right to recover 30 per cent of defendant's share of the \$75,000 bequest to the home or of his share of the residuary bequest. It can surely make no difference that receipt of the money was necessarily postponed until the death of Harry L. We are unable to say that it was

not within the contemplation of the parties that plaintiffs should receive their proportion of all sums received by defendant from their labors, whether such sums were received immediately on the close of the litigation or whether they were received at some future time. The interest of defendant in the corpus of the Harry L. Bemis trust existed at the close of the litigation, was secured to him by plaintiffs' efforts, and was assigned specifically to him by the final decree entered in the Levi Bemis estate. It was not available to defendant until the trust terminated, but it then became payable to him. We hold that plaintiffs were then entitled to their 30 per cent of this sum, if they were entitled to their agreed compensation for any of the results achieved.

2. Did plaintiffs perform their part of the contract; did they do what they agreed to do, so as to entitle them to the agreed compensation? The claim of defendant seems to be that plaintiffs agreed to set aside the will "*in toto*," or annul the trusts "*in toto*," or to charge nothing for their services. It is true that the will was not set aside "*in toto*," and that the trusts for the sons were not "annulled *in toto*," but the main trust for the home was "annulled *in toto*," and the trusts for the three sons were annulled as to the disposition of the corpus on the death of the beneficiaries.

The contract should be read as a whole, and the intention of the parties thereto arrived at from a consideration of the entire correspondence read in the light of the situation existing at the time and the results sought by the defendant, and those achieved. There can be no doubt that the chief if not the only grievance of the heirs of Levi Bemis was the testator's giving so large a portion of his estate to the "Levi Bemis Home for the Aged." It does not appear that they were dissatisfied with the other provisions of the will, or with their receiving the income instead of the principal. This fairly appears from the correspondence. The words "*in toto*" were doubtless used by plaintiffs in the effort to make it clear to defendant that they would make no claim to any part of the income from the trust created for defendant, unless that trust was annulled. It is to be noted that they were to receive their agreed compensation out of any sum received in compromise, and it is particularly worthy of

consideration that defendant specified clearly that "it is understood that this does not include the sum to be left with the N. W. Trust Co., or annual income from it, should that part of the will stand." This shows pretty clearly that defendant considered that plaintiffs would be entitled to their 30 per cent of amounts actually received by him outside of the income from the trust, although that part of the will stood. The fact is that the result of the litigation was a very substantial and practically complete victory for the sons of the testator. Indeed it is demonstrable that defendant received about the amount that would have come to him had there been no will. It is rather absurd to suppose that plaintiffs agreed to work for nothing unless they succeeded in having the will declared wholly void, or that this was the intention of either party to the contract. The big thing sought was getting for the heirs the money given to the home, and this was fully accomplished. Our conclusion on this branch of the case is that plaintiffs fully performed their contract and are entitled to the agreed compensation, unless the contract was invalid.

3. The claim that the contract is champertous is based wholly upon the concluding language of defendant's last letter: "If no recovery is made, then we (W. E. and I) are to be at no expense whatsoever." It is contended that this amounted to an agreement that plaintiffs were to pay the costs of the litigation. We do not so construe the language. We think it clear from the rest of the letter and the other correspondence that this language refers only to expense for attorney's services. Defendant was simply emphasizing plaintiffs' proposition that they were to receive nothing for their services, "make no charge whatsoever," if they did not secure a recovery.

Our conclusion on the whole case is that the trial court should have granted plaintiffs' motion for judgment, and denied the motion of defendant.

Reversed with directions to grant judgment for plaintiffs.

GEORGE E. YOUNG v. CATHERINE BAKER.<sup>1</sup>

February 11, 1915.

Nos. 19,017—(234).

**Mortgage — evidence necessary to establish.**

1. A deed absolute in form may be shown by parol evidence to be in fact a mortgage. To sustain a decision to that effect the evidence must be clear, strong and convincing, but not necessarily beyond a reasonable doubt.

**Same — finding on appeal.**

2. This court will sustain a finding of the trial court that a deed in form is a deed in fact, unless the evidence clearly and manifestly requires a determination to the contrary.

**Finding sustained by evidence.**

3. The evidence in this case is conflicting, and it sustains a finding of the trial court that a deed from plaintiff's grantor to defendant was a deed in fact and not a mortgage.

Action in the district court for Hennepin county to determine adverse claims to certain real estate. The case was tried before Hale, J., who made findings and ordered judgment in favor of defendant. From an order denying plaintiff's motion for a new trial and an order denying his motion for amended and substituted findings of fact and conclusions of law, he appealed. Affirmed.

*R. M. Hayes and George E. Young, for appellant.*

*George Harold Smith and Francis B. Hart, for respondent.*

HALLAM, J.

Plaintiff asks that a deed absolute in form, given by his grantor Robert Schulz to defendant, be adjudged a mortgage. Schulz owned an undivided one-ninth interest in a tract of land which formed part of his father's estate. February 14, 1902, he borrowed either \$500 or \$550 from the defendant, who is his aunt. No note was given and

<sup>1</sup> Reported in 151 N. W. 132.

no security given at the time. On January 10, 1903, Schulz gave to defendant a deed absolute in form of all his interest in this land. Defendant claims that the deed of the land was given in payment of the loan, and she now claims title under this deed. Plaintiff claims that the deed, while absolute in form, was in fact a mortgage given to secure the loan, and claims that Schulz later repaid the amount in money. In 1907 Schulz quitclaimed to plaintiff, and he brings this action to quiet title. The court found in effect that the deed from Schulz to defendant was what it purported to be, an absolute deed of the land. This is the pivotal question in the case. We are asked to hold that the finding of the court is not sustained by the evidence.

It is well settled that a deed, absolute in form, may be shown by parol evidence to be in fact a mortgage. To warrant a court in holding that a writing, in form an absolute deed, is in fact a mortgage, something more than a mere preponderance of evidence is required. In some cases this court has gone so far as to hold that the evidence must establish this fact beyond a reasonable doubt. *Sloan v. Becker*, 34 Minn. 491, 26 N. W. 730; *Wakefield v. Day*, 41 Minn. 344, 43 N. W. 71; *A. J. Dwyer Pine Land Co. v. Whiteman*, 92 Minn. 55, 99 N. W. 362. These decisions were built upon the case of *Guernsey v. American Ins. Co.* 17 Minn. 83 (104), where it was held that proof beyond a reasonable doubt was required to sustain an action to reform a written contract on the ground of mistake, and it was said in *Sloan v. Becker*, *supra*, that "wherever the degree of proof required in cases like this is mentioned, the rule is stated the same as in suits to reform instruments." In *Wall v. Meilke*, 89 Minn. 232, 94 N. W. 688, the *Guernsey* case was overruled insofar as it established this rule of evidence in actions to reform contracts, and the rule was established that all that is required in such cases is that the evidence be clear, strong and convincing. Later cases following the principle of *Wall v. Meilke* have generally applied the same rule to an action to declare a deed a mortgage, and the rule in this state now is that the proof required in such a case must be clear, strong and convincing, although not necessarily beyond a reasonable doubt. *Minneapolis Threshing*

Machine Co. v. Jones, 95 Minn. 127, 103 N. W. 1017; Stitt v. Rat Portage Lumber Co. 96 Minn. 27, 32, 104 N. W. 561; Teal v. Scandinavian American Bank, 114 Minn. 435, 131 N. W. 486. This was the burden resting upon plaintiff in this case.

This court will not disturb the finding of the trial court upon that issue, unless it is manifestly and palpably without support in the evidence. This is the general rule as to all findings of the trial court, and the fact that the case is one wherein plaintiff is required to establish his case by something more than a mere preponderance of evidence, does not change the rule. It is still and always the duty of this court to sustain the finding, unless the evidence clearly and manifestly requires a determination contrary to that reached by the trial court. Oertel v. Pierce, 116 Minn. 266, 133 N. W. 797, Ann. Cas. 1913A, 854; Foster v. Brick, 121 Minn. 173, 175, 141 N. W. 101; Freeburg v. Honemann, 126 Minn. 52, 147 N. W. 827.

In this case the evidence is in conflict. Schulz gave testimony that in January, 1903, he was about to be sued on a personal injury claim and that he approached defendant and said: "Mrs. Baker, I may have a little trouble and I would like to put the deed of my land in your name to secure your five hundred dollars," and that defendant assented. This was eleven months after the loan was made. Schulz further testified, that about a month later he repaid the loan in full, but that he did not take a reconveyance of the land because of the personal injury claim against him; that judgment was later secured on said claim and Schulz took advantage of bankruptcy proceedings to defeat it, and did not demand a reconveyance until after his discharge in bankruptcy. Schulz's testimony that this conveyance, in form a deed, was in fact a mortgage, is corroborated by some testimony of admissions alleged to have been made by defendant, and it receives corroboration in some of the attendant circumstances, such, for example, as the fact that defendant for years paid no taxes upon this share of the land and permitted the premises to be rented by the other co-owners, and demanded no share of the rent.

On the other hand, defendant testified that Schulz proposed to her that she take his interest in the land in payment of the debt, and that later, through her son, she advised him that she would do so.

Her son corroborates her. Some other witnesses gave corroborating testimony. Schulz does not appear before the court in a favorable light. He admits that one purpose he had in making the deed to defendant was to defraud a creditor and to save the property from bankruptcy proceedings that later followed. In the bankruptcy proceedings he did not schedule this property, and made oath that he had no property other than that scheduled. Whether the bankruptcy proceedings, as a matter of law, precluded him from later asserting title to this property, is a question which we do not discuss or decide. We may, for purposes of this case, assume that those proceedings did not so preclude him. The fact remains that Schulz's sworn statement made in the bankruptcy proceedings is strong impeaching evidence here. The decision of the trial court is in exact accord with that sworn statement. To say that a decision in accord with the former sworn statement of plaintiff's principal witness is clearly and palpably against the evidence, would be an astonishing proposition. If it be true that Schulz concealed his property from his creditors so successfully that all trace of his title was lost to them, he should not be surprised or disappointed if the court fails to follow the trail of his title after the occasion for concealment has passed. The evidence amply sustains the finding of the trial court that this deed in form was a deed in fact and that it divested Schulz of all title to the land. Plaintiff, the grantee of Schulz, stands in his shoes, and his title must also fail.

Order affirmed.

---

HYDRAULIC-PRESS BRICK COMPANY v. HAYNES  
BREAD COMPANY and Others.<sup>1</sup>

February 11, 1915.

Nos. 19,026—(211).

**Contract—acceptance of defective material.**

1. A carload of defective building material was shipped by plaintiff to

<sup>1</sup> Reported in 151 N. W. 140.

128 M.—26.

defendants Butler, building contractors, who, without examining the material while on the car, sent a drayman to haul it to the building for which it was intended. When the first load arrived at the building, they discovered the defect and thereupon conferred with the owner of the building, and, being informed that the use of such material would not be permitted, they reloaded upon the car all the material removed therefrom and immediately returned the entire carload to plaintiff. *Held* that unloading a portion of the defective material under such circumstances did not constitute an acceptance thereof.

**Breach of contract — measure of damages.**

2. Plaintiff, having contracted with the Butlers to manufacture and deliver certain material for the building not obtainable in the market, and, having failed to deliver such material at the time agreed upon, is liable to them for the additional expense necessarily incurred in consequence of such default; but the damages should be limited to such necessary additional expense, and should not include any expense which could have been avoided by reasonable effort on the part of the Butlers.

**Same — error to exclude evidence.**

3. It was error to exclude testimony tending to show that the damages resulting from plaintiff's failure to deliver material on time could have been lessened by proper effort on the part of the Butlers.

**Damages excessive.**

4. The amount allowed against plaintiff as damages is excessive, for the reason that expenses are included therein which did not necessarily result from plaintiff's delay in delivering the material.

Action in the district court for Ramsey county to foreclose a mechanic's lien. The case was tried before Catlin, J., who made findings and ordered judgment in favor of Butler Brothers in the sum of \$68.50. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed and new trial granted.

*C. J. Rockwood*, for appellant.

*Schmidt & Waters, Butler & Mitchell* and *J. M. Martin*, for respondents.

TAYLOR, C.

Suit to foreclose a mechanic's lien. On September 2, 1911, the defendants Butler contracted with defendant Haynes Bread Co. to construct a bakery building for the bread company, in the city of St.

Paul, and to complete the building on or before December 1, 1911. Shortly thereafter, the Butlers made a contract with plaintiff under which plaintiff furnished enameled terra cotta for the front of the building of the agreed value of \$960, and enameled brick and other material of the agreed value of \$1,760.41, amounting in the aggregate to the sum of \$2,720.41. It is conceded that plaintiff furnished this material, that it was used in the building, and that it was of the value stated; but plaintiff did not furnish the terra cotta within the time agreed upon, nor until December 14, 1911, and, in consequence, the Butlers were unable to complete the building within the time they had agreed to do so. They interposed a counterclaim for damages occasioned by this delay, and the sole controversy is over this counterclaim. The trial court allowed the following items:

Freight paid .....	\$ 355.76
Construction of false or temporary front .....	30.27
Unloading and reloading green terra cotta .....	14.50
Extra cost of labor in laying brick and terra cotta ..	485.75
Expense for heating building .....	196.92
Extra expense for operating hoisting engine .....	52.50
Coke for heating mortar .....	75.00
Extra wages for superintendent, carpenter foreman, engineer and watchman .....	1,025.21
Value of use of building from December 1 to March 10 .....	543.00
Total .....	<u>\$2,778.91</u>

The aggregate of the amounts so allowed exceeded the amount of plaintiff's claim, and judgment was rendered against plaintiff and in favor of the Butlers for such excess. Plaintiff appealed.

Plaintiff agreed to deliver the material f.o.b. cars at St. Paul, and admits that the Butlers paid the freight and are entitled to the amount allowed them therefor, but challenges all the other items allowed by the court. Plaintiff agreed to furnish cream colored terra cotta, but made an error in the order transmitted from the office to the factory by reason of which it was manufactured of a green color. When manufactured it was shipped to St. Paul and the Butlers noti-

fied of its arrival. They employed a drayman to remove it from the car to the building, who commenced hauling it on November 4. When the first load arrived at the building the Butlers discovered that it was green instead of cream colored, and thereupon interviewed the bread company to learn whether the green terra cotta could be substituted for cream colored. The bread company refused to permit such substitution. In the meantime the drayman had hauled three loads from the car to the building. All the terra cotta that had been removed from the car was immediately replaced thereon and the entire lot returned to plaintiff. Plaintiff manufactured and shipped another lot of the correct color which was received and unloaded on December 14, 1911. It is conceded that the terra cotta was of a special design made expressly for this building and could not be purchased upon the market, and also that plaintiff knew that the Butlers were under contract to complete the building by December 1. As the terra cotta could not be purchased in the market, the Butlers were compelled to have it manufactured either by plaintiff or others. Had that received on November 4 been such as plaintiff agreed to furnish, they could easily have completed their contract within the stipulated time.

Plaintiff contends that the Butlers accepted the green terra cotta as a performance of plaintiff's contract, for the reason that they removed a portion of it from the car. The Butlers did not discover that it was green instead of cream colored until the first load arrived at the building. They promptly conferred with the owner of the building to see if they would be permitted to use it, and not obtaining such permission, immediately and on the same day, reloaded all that had been unloaded and returned it to plaintiff. Plaintiff made no claim at that time that it had been accepted, but admitted making the mistake, and proceeded to manufacture and deliver a new lot without raising any such question. The claim that the green terra cotta had been accepted, now made for the first time, cannot be sustained.

One who fails to perform his contract is liable for such damages as the parties, if they had looked forward to the consequences of nonperformance when making the contract, would have contemplated as likely to follow from its breach, and which did in fact follow from its breach. 1 Dunnell, Minn. Dig. § 2559, and cases cited. This rule is supplemented, and perhaps modified, by the rule that the party in-

jured by the default must use all reasonable means to prevent any unnecessary loss, and cannot recover for any loss which could have been avoided by proper effort on his part. *Baessetti v. Shenango Furnace Co.* 122 Minn. 335, 142 N. W. 322; *Hewson-Herzog Supply Co. v. Minnesota Brick Co.* 55 Minn. 530, 57 N. W. 129.

The Butlers claim that after the correct terra cotta arrived the weather became so inclement that it was necessary to suspend work entirely for an extended period, and that, on account of these delays and of weather conditions at the time the work was in fact performed, the expense of performing it was largely increased. The greater part of the damages allowed rest upon this claim. The rear wall of the building and the side walls, from the rear to within about 14 feet of the front, were erected in November, and a temporary or false front was constructed between the side walls and about 14 feet back from the front of the building. This front was built for the purpose of inclosing a portion of the building so that it could be warmed and work be carried on therein. The terra cotta was all used in the front of the building and outside this inclosure, and plaintiff is charged with a large amount of damages claimed to have been caused by delays and inconveniences in laying it resulting from the weather conditions. Plaintiff offered to prove by competent testimony that it was entirely feasible, at a small additional expense, to construct a temporary or false front so as to enclose the entire front of the building and permit the construction of the front without interruption or increased expense on account of the weather, and that this was the usual and customary method of doing such work under such conditions. All testimony offered for this purpose was excluded. It had a direct bearing upon whether the Butlers made proper efforts to avoid any unnecessary damages and should have been admitted. Its exclusion was substantial error.

The contention of plaintiff that the amount allowed as damages is greater than the evidence will justify must also be sustained. The Butlers are entitled to recover the additional expense necessarily incurred by them in consequence of plaintiff's default; but the damages should be limited to such necessary additional expense, and should not include any expense to which they would have been subjected if

such default had not occurred, nor any expense which could have been avoided by reasonable effort on their part. The court found that "on account of severe cold weather" they "necessarily expended for labor in laying brick and terra cotta on the front of said building the sum of \$485.75 more than said labor would have cost if said work could have been done \* \* \* during the month of November." They began this work on December 14, and state that they had it so nearly completed on December 31 that they could have finished it in two days more if the weather had permitted. On the night of December 31 the weather turned intensely cold and so remained through nearly all of January, and all work was suspended for three or four weeks. As soon as the weather moderated, the laying of the brick and terra cotta was completed, and apparently only two days were required in which to complete it.

The Butlers testify that the weather conditions during November were ideal for the performance of such work, and, although the temperature was frequently near zero, that it was not cold enough to cause any inconvenience. They put in evidence the official weather record kept at St. Paul covering the period November 1, 1911, to March 10, 1912. From this record, it appears that the weather conditions were as favorable in December as in November. In fact the average temperature for the month was slightly warmer in December than in November. It follows that the claim that doing the work in December was more expensive than doing it in November, for the reason that the weather had become more severe in December, is not borne out by the evidence.

The court found that, under their contract with the bread company, the Butlers were required to heat the building "when necessary, on account of the weather, to dry out the plastering and do the finishing," and that they began heating the building in February for this purpose and continued it until the work was completed. The court allowed against plaintiff the entire amount paid by the Butlers on account of such heating. If no such expense would have been incurred if the work had been performed in November, the allowance was correct; but if such heating would have been necessary if the work had been done in November, then plaintiff should have been

charged only with the amount, if any, which the expense actually incurred exceeded the expense that would have been incurred if the work had been done in November.

More than a thousand dollars are allowed for what are termed extra "overhead" charges. These consist of wages or salary for one of the Butlers as superintendent, for a carpenter foreman, for an engineer, and for a watchman. Some of these charges cover services which perhaps were necessary, and would not have been necessary except for plaintiff's default; but a large portion of them are plainly not within the rule. These charges include the wages or salary of these men from the beginning of the work in December until it was finished, including the time during which all work was suspended, and regardless of whether they were or were not actually engaged upon the work. Their wages for the time during which they were necessarily engaged in this work, over and above the time during which they would have been engaged therein if plaintiff had not delayed them, were properly chargeable to plaintiff; but no allowance can be made for extra time not actually and necessarily devoted to the work. If, for the purpose of retaining their men, the Butlers paid them wages during the time they were not employed, no circumstances are shown which will justify them in charging such expense to plaintiff. It may be added that peculiar and exceptional circumstances must be shown to entitle either of the Butlers to pay for their own time. The damages included in this item were based upon an incorrect rule and cannot be sustained.

As there must be a new trial, we think we have indicated sufficiently the rule that should be applied in the measurement of the damages, and that further discussion is unnecessary.

Order reversed and a new trial granted.

**MATHIAS BERG v. PITTSBURGH CONSTRUCTION COMPANY.<sup>1</sup>**

February 11, 1915.

Nos. 19,061—(213).

**Res gestæ—statements of agent.**

1. Statements or admissions made by an agent, so remote from the occurrence to which they relate as not to be part of the *res gestæ*, are inadmissible against the principal, unless authority to speak for the principal be first shown.

**Master and servant—temporary scaffold.**

2. The record herein discloses that the temporary staging, which defendant's servants provided in doing a work which was neither dangerous nor complicated, was not an instrumentality of the sort which it is the master's absolute duty to furnish or inspect.

Action in the district court for Hennepin county to recover \$3,000 for injuries received while in the employ of defendant. The case was tried before Molyneaux, J., who denied defendant's motion to dismiss the action, and a jury which returned a verdict for \$1,500. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed with direction to enter judgment in favor of defendant notwithstanding the verdict.

*Barrows, Stewart & Ordway*, for appellant.

*Hall, Tautges & Loeffler*, for respondent.

<sup>1</sup> Reported in 150 N. W. 1092.

---

Note.—Upon the admissibility as *res gestæ* of statements made by agent or servant sometime after the accident, see note in 42 L.R.A.(N.S.) 918.

On the question of the master's liability for negligence of coservants in respect to defective scaffolds, see note in 54 L.R.A. 170. And for the masters' duty as to inspection of instrumentalities, generally, see note in 41 L.R.A. 70.

HOLT, J.

On July 11, 1913, plaintiff, a carpenter, was engaged with others in making alterations in the railway viaduct under the westerly approach of the steel arch bridge in Minneapolis, Minnesota, the changes being rendered necessary in the erection of a new Great Northern depot at that point. During a heavy rainstorm on that day, the water, collecting upon the street above, poured down upon a dirt bank in the viaduct and caused it to wash away. Thereupon the foreman called plaintiff and one Leedham, another carpenter, to protect the bank by a temporary roof. The men could not reach without something upon which to stand. Plaintiff suggested that they make a scaffold. The foreman, in response, said he would have to get something, and then told plaintiff to go up to the street and bring down boards for the roof or sheathing. When plaintiff returned he found two 10-inch planks, 14 feet long, laid side by side, so that one end rested upon the earth embankment and the other over the top of the remnant of a sewer connection—a shaft or well about 6 feet square of stone, about 7 feet of which had been uncovered as the excavations had been made in the progress of the work. Plaintiff testified that he heard afterwards that the foreman and Leedham had placed the planks there. Plaintiff and Leedham, without any express direction from the foreman, undertook to get up on this staging and nail up the sheathing; but, before doing so, plaintiff concluded that the bearing power of the planks was not sufficient to safely support them, and, at his suggestion, the two placed one plank on top of the other and then proceeded with the work. When over or near the edge of this sewer shaft something gave way, precipitating the two men to the bottom of the shaft, some 20 feet below. Plaintiff does not know the cause of this accident, unless an inference is permissible from the fact that a piece of stone was upon or under his ankle when he was picked up after the fall. He, however, was allowed to testify that several days after the injury defendant's superintendent told him that part of the stone of the shaft, upon which the planks had been laid, had broken off. Plaintiff had a verdict against his employer. The appeal is from the order denying defendant's motion

in the alternative for judgment notwithstanding the verdict or a new trial.

The negligence charged in the complaint was (1) furnishing plaintiff an unsafe place wherein to work, and (2) selecting a defective scaffold support. The only witness to the circumstance of the accident was plaintiff, but it was stipulated that the jury could consider his fellow servant, Leedham, to have been present and testified to the same facts.

It is clear that the statement of the superintendent as to the cause of the accident, made several days thereafter, was erroneously received over defendant's objection that it was incompetent and no foundation laid. The superintendent was an agent only of the defendant, and could not by his admissions subsequent to the occurrence bind his principal in the absence of authority so to do. 1 Dunnell, Minn. Dig. §§ 3410, 3418. The suggestion is made that defendant, by failing to move to strike out the objectionable testimony after it was received, waived the error. It is not necessary to consider that proposition, because, for other reasons, there can be no recovery.

The evidence demonstrates that the use of the planks, the embankment, and the sewer shaft for temporary staging was but an incident in the rather simple work there required to be done by defendant's employees. Neither the foreman nor Leedham can be considered anything but fellow servants in selecting the planks and the supports for the same. The condition of the sewer shaft was as obvious to plaintiff as to those men. He assisted in shifting the planks after Leedham and the foreman had placed them in position. To hold that the master was chargeable with an absolute duty to see that the instrumentalities made use of in this case for a temporary staging were reasonably safe would be adopting a rule virtually making the employer an insurer of the employees' safety, no matter how simple or easily understood the means adopted by the employees to accomplish a task neither complicated nor dangerous. We are unable to distinguish this case from the facts which were held to give no cause of action in *Soutar v. Minneapolis International Ele. Co.* 68 Minn. 18, 70 N. W. 796, and *Bell v. Lang*, 83 Minn. 228, 86 N. W.

95. The servants in the case at bar made use of the sewer shaft as a temporary support while engaged in the simple work of nailing up some boards to overcome an emergency; the box in the Soutar case, and the tree in the Bell case were made use of for a similar purpose in the course of the work in hand. See also *Lindvall v. Woods*, 41 Minn. 212, 42 N. W. 1020, 4 L.R.A. 793; *Bergquist v. City of Minneapolis*, 42 Minn. 471, 44 N. W. 530; *Marsh v. Herman*, 47 Minn. 537, 50 N. W. 611; *Oelschlegel v. Chicago G. W. Ry. Co.* 73 Minn. 327, 76 N. W. 56, 409, wherein attention is called to the fact that the master is not held to the responsibility of inspecting and seeing to the safety of the temporary appliances which the servants construct or make use of in the performance of work which is neither so dangerous nor so complicated as to require supervision or plans to adequately and reasonably protect the servants. The cases upon which plaintiff relies are so clearly distinguishable from the rule which must be applied to the facts in the instant case that we need not discuss them.

It is apparent that plaintiff is in no position to make a better case on another trial, hence judgment should go for defendant.

Ordered that judgment be entered for defendant notwithstanding the verdict.

---

PEARL BRANDENBURG v. NORTHWESTERN JOBBERS  
CREDIT BUREAU and Another.<sup>1</sup>

February 11, 1915.

Nos. 19,097—(288).

**Conversion — evidence.**

1. To constitute a conversion of personal property of another there must be some exercise of the right of complete ownership and dominion over it to the total exclusion of the rights of the owner, or else some act done which

<sup>1</sup> Reported in 151 N. W. 134.

destroys it or changes its character or in some way deprives the owner of it permanently or for an indefinite length of time.

Same.

2. Conversion may be proved by demand and refusal of possession, but evidence of this is not necessary if there is other evidence of actual conversion.

Same — commingling of goods.

3. Neglect of a bailee to notify the bailor of a sale of the premises where a gratuitous bailment is kept is not a conversion where no loss or misappropriation follows; nor is the advertising of goods for sale through mistake a conversion so long as there is no sale or loss or misappropriation; nor is the sale of a few articles which have in some manner become commingled with the bailor's goods a conversion of the whole stock, in the absence of evidence as to how the commingling took place.

Action in the district court for Ramsey county to recover \$800.63 value of the goods alleged to have been converted. The case was tried before Catlin, J., who at the close of plaintiff's case granted the motion of defendant Credit Bureau to dismiss the case as to it. From an order denying plaintiff's motion for a new trial, she appealed. Affirmed.

*Charles M. Brewer and F. A. Pike, for appellant.*

*Todd & Kerr and Walter Fosness, for respondent.*

HALLAM, J.

This is an action in conversion. The court dismissed the action at the close of plaintiff's case and plaintiff appeals. The facts are as follows:

Plaintiff's husband conducted a general store at Faribault. Plaintiff conducted a millinery business on a balcony of the store. The husband failed and transferred his stock to a representative of defendant Northwestern Jobbers Credit Bureau, for the benefit of creditors, and the bureau took charge of the stock and building. When this occurred, plaintiff discontinued her millinery business, packed her goods in boxes, and left them in the balcony, by permission of the bureau's representative. She paid nothing for the privilege. In other words, the bureau was a gratuitous bailee. There is

evidence that the representative of the bureau agreed to notify plaintiff when it disposed of the stock or put any one else in possession. A few weeks later the husband's stock was sold to defendant Wendlandt and he was put in possession of the store. Wendlandt at once proceeded to advertise the stock for sale. Under the mistaken belief that the millinery was part of the stock he had purchased, he prepared an advertisement announcing a "trustee's sale" of the stock, and included the millinery stock in the advertisement. Before the sale commenced, he discovered his error. At no time after the sale commenced did he make any claim to the stock of millinery in the balcony. On the contrary, the evidence is undisputed that during the sale he instructed his clerks that the millinery stock belonged to plaintiff, and directed them not to touch it. There is evidence, however, that some small articles from this stock became in some manner commingled with the general stock and were sold by Wendlandt's clerks, and there is evidence that his wife took some articles from the millinery stock. There is also evidence that when an inventory of the millinery stock was taken, about a month later, the amount on hand was nearly \$100 less than when inventoried at the time of closing the store. The bureau's representative did not notify plaintiff of the sale to Wendlandt, but a friend of plaintiff notified her by telephone before the trustee's sale commenced. Plaintiff went to the store a very few days later. She took no exception to any conduct of defendants, in fact she opened negotiations for leaving the stock in the balcony and for renting the balcony from defendant Wendlandt in order to reopen her millinery business.

Plaintiff does not sue for conversion of the few articles claimed to have been taken and sold, and she asks for no recovery on that basis. Her contention is that both these defendants converted the whole stock of millinery to their own use. The question is, did the evidence make out a *prima facie* case of such conversion? We hold it did not.

It is a little difficult to frame a comprehensive definition of conversion. In *Burroughes v. Bayne*, 5 H. & N. 296, Baron Bramwell observed that "after all, no one can undertake to define what a conversion is." But in general it may be said that to constitute a conversion of personal property there must be some exercise of the right of

complete ownership and dominion over it, to the total exclusion of the rights of the owner, or else some act done which destroys it or changes its character or in some way deprives the owner of it permanently or for an indefinite length of time. See *Hodge v. Eastern Ry. Co. of Minn.* 70 Minn. 193, 196, 72 N. W. 1074; *McCurdy v. Wallblom F. & C. Co.* 94 Minn. 326, 102 N. W. 873, 3 Ann. Cas. 468; *Sutton v. Great Northern Ry. Co.* 99 Minn. 376, 109 N. W. 815; *Merz v. Croxen*, 102 Minn. 69, 112 N. W. 890. Conversion is often proved by a demand of possession by the owner and refusal by the person in possession to deliver. There was no demand or refusal in this case. Demand and refusal are, however, merely evidence of conversion and need not be proved when there is other evidence of conversion in fact. *Kronschnable v. Knoblauch*, 21 Minn. 56; *Kenrick v. Rogers*, 26 Minn. 344, 4 N. W. 46; *Homberger v. Brandenburg*, 35 Minn. 401, 29 N. W. 123; *Adams v. Castle*, 64 Minn. 505, 67 N. W. 637; *Hogan v. Atlantic Elevator Co.* 66 Minn. 344, 349, 69 N. W. 1. The question is, was there in this case other evidence of an actual conversion?

As to the defendant Northwestern Jobbers Credit Bureau, the case is clear. There is not a single element of conversion by that defendant. It did not sell plaintiff's stock nor in any manner misappropriate it. The only delinquency claimed on its part was its failure to keep a promise to notify plaintiff that her husband's stock had been sold and the purchaser put in possession. But neglect of this sort on the part of a bailee is not conversion of goods which were in no manner misappropriated, injured or destroyed. See *McCurdy v. Wallblom Furniture & Carpet Co.* 94 Minn. 326, 102 N. W. 873, 3 Ann. Cas. 468. Nor could defendant's neglect in this particular have caused plaintiff any damage, for plaintiff was advised of the transfer by a friend before the "trustee's sale" commenced.

As to defendant Wendlandt, it likewise seems to us that the evidence falls short of proof of conversion. The mistaken advertisement of goods for sale not followed by any sale or by any exercise of dominion or ownership, is not a conversion. It has been held that even a paper sale of goods does not constitute conversion if made by mistake and there is no misappropriation in fact. 28 Am. & Eng. Enc.

(2d ed.) 700; Traylor v. Horrall, 4 Blackf. 317. There is doubtless evidence of conversion of some few articles of this stock and if recovery were asked for the value of these a case would be made for the jury. But it in no manner appears from the evidence how or under what circumstances these articles were taken or commingled. The conversion of a few articles out of the stock in some manner not disclosed did not constitute conversion of the whole stock which was untouched and as to which defendant at all times expressly disclaimed ownership or dominion.

Order affirmed.

---

OTTER TAIL POWER COMPANY v. EDWARD A.  
BRASTAD.<sup>1</sup>

February 19, 1915.

Nos. 18,484—(31).

**Public service corporation — electric light and power.**

1. The furnishing of electric light and power to the public is a public service, and land or water taken to forward such an enterprise is taken for a public use.

**Eminent domain — petition to condemn — pleading authority.**

2. It is not necessary that the petition of a corporation in condemnation proceedings should allege that the proceeding was authorized by its board of directors.

**Interference with navigation.**

3. A public service corporation authorized to condemn private property cannot interfere with the navigable capacity of any navigable stream unless authorized by statute, but it may take the private rights of property of the riparian owner upon compliance with the Constitution and laws of the

<sup>1</sup> Reported in 151 N. W. 198.

---

Note.—On the question as to whether the taking of property for production and distribution of light by electricity is a public purpose, see note in 22 L.R.A. (N.S.) 137.

state, and upon making just compensation, whether the stream be navigable or not.

**Eminent domain — description in petition.**

4. A description of the right to be taken as "a portion of the waters of the Otter Tail river \* \* \* leaving at all times in the channel of said river sufficient water for all public and domestic uses," is a sufficiently definite description.

**New trial — inadequate damages.**

5. The damages assessed are not so inadequate as to require the granting of a new trial or any disturbance of the verdict.

In the matter of the application of Otter Tail Power Co. to the district court for Otter Tail county, to condemn certain land and a perpetual easement of diverting water of the Otter Tail river from flowing past certain land, Edward A. Brastad appeared, filed objections to the appointment of commissioners, and appealed from the award of the commissioners. The matter was heard before Taylor, J., and a jury which assessed his damages at \$425. His motion for a new trial was denied. From the judgment entered pursuant to the order for judgment, he appealed. Affirmed.

*Gunderson & Leach*, for appellant.

*John A. Brown and Brown & Guesmer*, for respondent.

HALLAM, J.

This is an appeal from a judgment in proceedings to take water from the Otter Tail river under power of eminent domain. Appellant owns land abutting upon this stream.

1. It is contended the petition does not show that the condemnation is for an exclusively public use. We think it does. The petition alleges that respondent corporation was organized for the purpose of acquiring, constructing and operating dams, reservoirs, power plants and other instrumentalities in order to furnish electric power for public use and to supply the public with electric light and heat. It further alleges that the diversion of the waters is proposed to be made in order to improve and increase the water power furnished by the Otter Tail river for the purpose of manufacturing and furnishing electric power to the public, and that such improve-

ment and increase of said water power for the purpose aforesaid will be a public use of great value and convenience in supplying the public with such electric power. This language makes it clear that the purpose of the condemnation is a public purpose, and a public purpose alone. The furnishing of electric light and power to the public is a public service, and the use of land or water to forward such an enterprise is a public use. *Minnesota Canal & Power Co. v. Koochiching Co.* 97 Minn. 429, 450, 107 N. W. 405, 5 L.R.A. (N.S.) 638, 7 Ann. Cas. 1182; *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 213, 112 N. W. 395, 11 L.R.A. (N.S.) 105; *State v. Consumers Power Co.* 119 Minn. 225, 137 N. W. 1104, 41 L.R.A. (N.S.) 1181, Ann. Cas. 1914B, 19; 1 Lewis, *Eminent Domain*, (3d ed.) § 268.

2. Another objection to the petition is that it fails to allege that the petitioner was authorized by its board of directors to institute the proceedings. The statute requires that the proceeding when taken by a corporation shall be taken "in its corporate or official name and by the governing body thereof." G. S. 1913, § 5397. It does not require the petition to in terms allege that the proceedings are authorized by the board of directors. This is matter of evidence. We know of no rule of practice or pleading that requires such allegation and we are cited to no authority that holds it necessary. The evidence makes it clear that the proceeding was prosecuted by authority of the corporation, either by original action or ratification. This is all that the case requires. 2 Lewis, *Eminent Domain* (3d ed.), § 505; *Tennessee Cent. R. Co. v. Campbell*, 109 Tenn. 655, 73 S. W. 112; *Milwaukee L. H. & T. Co. v. Milwaukee Northern R. Co.* 132 Wis. 313, 112 N. W. 663; *State v. Superior Court*, 44 Wash. 108, 87 Pac. 40.

3. Appellant contends that this stream is a public or navigable stream. It is not important in this case whether it is or not. If this be a public or navigable stream, that fact cannot help the appellant. A public service corporation authorized to condemn private property for public uses may not, under the right of eminent domain, interfere with the navigable capacity of any of the navigable waters of the state, unless such interference is authorized by statute. But

it may take the private rights of property of the riparian owner upon complying with the Constitution and the laws of the state, and upon making just compensation therefor. *Hanford v. St. Paul & Duluth R. Co.* 43 Minn. 104, 111, 42 N. W. 596, 44 N. W. 1144, 7 L.R.A. 722; *Minnesota Canal & Power Co. v. Koochiching Co.* 97 Minn. 429, 443, 107 N. W. 405, 5 L.R.A.(N.S.) 638, 7 Ann. Cas. 1182; *Minnesota Canal & Power Co. v. Pratt*, 101 Minn. 197, 218, 112 N. W. 395, 11 L.R.A.(N.S.) 105; *Minnesota Canal & Power Co. v. Fall Lake Boom Co.* 127 Minn. 23, 148 N. W. 561; *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.* 142 U. S. 254, 12 Sup. Ct. 173, 35 L. ed. 1004; *St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners*, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. ed. 497, affirming 56 Minn. 485, 58 N. W. 33; *Farnham, Waters & Water Rights*, § 85; *Gould, Waters*, § 246; *Lewis, Eminent Domain*, §§ 87, 88, 93.

4. It is contended that the petition is too vague, indefinite and uncertain as to the property of rights which the petitioner seeks to condemn. The petition alleges that "petitioner desires and purposes to divert a portion of the waters of the Otter Tail river, \* \* \* leaving at all times in the channel of said river sufficient water for all public and domestic uses; to conduct the said waters from said point of diversion by means of a canal and tunnel" to a reservoir, thence through a pipe line to the power house of petitioner, thence again returned to the channel of the river below appellant's land. There is nothing to show how much water in depth will be left in the river, nor how much in cubic contents will be taken out.

Undoubtedly the description of the land to be taken must be certain and definite enough so that it may be determined where lies the dividing line between what is to be taken and what is to be left remaining. To that end the description of the land or rights taken should be made as definite as would be necessary in a deed. *Mathias v. Drain Comr.* 49 Mich. 465, 13 N. W. 818; *Rice v. Danville, L. & N. T. R. Co.* 37 Ky. 81. There is no doubt that the description here in question would be sufficient in a deed. *Moore & Roy v. Wilder*, 66 Vt. 33, 28 Atl. 320.

In condemnation proceedings something more than this is neces-

sary. Since in such proceedings the compensation is fixed, not by agreement of the parties, but by an assessment made by commissioners, and on appeal by a court and jury, it is necessary that the description should be definite enough so that the commissioners and the court and jury may fairly fix or estimate the compensation to be allowed. It is contended the words, "a portion of the waters of the Otter Tail river \* \* \* leaving at all times in the channel of said river sufficient water for all public and domestic uses," are so indefinite that commissioners could not fairly estimate appellant's damages. We think the description is sufficient for that purpose.

It must be borne in mind that the material consideration is, not the benefit to be derived by the petitioner, but the damages sustained by the landowner. "It is the damage caused by imposing the easement on the land which the owner is entitled to receive." *Robbins v. St. Paul, Stillwater & T. F. R. Co.* 22 Minn. 286. It makes little or no difference what benefit the petitioner may receive (*West Virginia R. Co. v. Gibson*, 94 Ky. 234, 21 S. W. 1055; *Moulton v. Newburyport Water Co.* 137 Mass. 163, 167); and it is of little consequence whether or not the description furnishes data for an estimate of the value of such benefit. It seems to us that the language used in this case makes the estimate of the damage appellant has sustained as easily practicable as any language that could well be used. Where the right to appropriate a portion only of the water of a stream is taken, in the nature of things the amount taken or left cannot be fixed with mathematical certainty, but unless we are prepared to hold that the party seeking to condemn the right to take water from a stream must take all or none, we must be content with a description that approximates certainty. We cannot hold that the petitioner must take all of the water in this stream merely for the sake of greater certainty of description, when in fact it does not want to use it all. The proceedings might of course have required the leaving of a certain stage of water in the river, but it is manifest that in a stream of this sort this test would not be easy of application. They might have authorized the taking of a certain quantity of water in cubic feet, but this would leave wholly uncertain the amount that would be left, for the natural flow of water in such a

stream varies greatly, and the amount left after taking out a quantity fixed in cubic feet would vary accordingly. The taking of a fixed amount at all times might have involved greater damage than the petitioner had any desire to cause.

But these considerations are collateral and incidental only. The real question is, not whether this description employs the most certain language possible to be used, but whether it employs language reasonably sufficient for the purpose. It seems to us that it does. It gives a right to divert a portion of the waters of this stream, "leaving at all times in the channel of said river sufficient water for all public and domestic uses." The provision for "public uses" compels the petitioner to leave at all times in the stream sufficient water to serve all public uses to which the water of the stream may at any time be subject. The term "domestic" uses has a reasonably well-defined meaning. This provision requires the petitioner to leave at all times sufficient fresh running water to supply all the private uses of water and ice which may at any time be incident to the proper enjoyment of the riparian property. It seems to us that this description furnishes a practical working basis and furnishes a criterion of reasonably easy application. *Weaver v. Mississippi & R. R. Boom Co.* 30 Minn. 477, 16 N. W. 269, while not directly in point, tends to sustain the position we have taken. See also *Kuschke v. City of St. Paul*, 45 Minn. 225, 47 N. W. 786.

The cases cited by counsel for the appellant holding descriptions of water rights too indefinite, are easily distinguishable. In all of them there was uncertainty both as to the amount to be taken and also as to the amount to be left. For example, in *Hayden v. State*, 132 N. Y. 533, 30 N. E. 961, the canal commissioners commenced proceedings to acquire the right to take water from the outlet of Owasco lake for a feeder for the Erie canal, declaring that "the water and lands necessary for said feeder are hereby permanently appropriated." There was no limit as to the amount to be taken or as to the amount to be left, except the wholly indeterminate needs of the petitioner, and it was held that a description, to be sufficient, must be such "that the owner may know how much he has lost and what he is entitled to be compensated for." *Hamor v. Bar Harbor*

Water Co. 78 Me. 127, 3 Atl. 40; *People v. Trustees*, 137 N. Y. 88, 32 N. E. 1111; *Bell Telephone Co. v. Parker*, 187 N. Y. 299, 79 N. E. 1008; involve similar considerations. In *Aliso Water Co. v. Baker*, 95 Cal. 268, 30 Pac. 537, a complaint in an action to condemn water rights described them as "all the rights of each of the defendants whether as riparian owners or acquired by appropriation, adverse use, or prescription, except for domestic use and reasonable irrigation of their riparian lands." There is some language in the opinion which tends to sustain the contention appellant makes in this case, but the case was disposed of on the ground that the complaint was insufficient because there was no attempted description of what rights were in fact held "by adverse use, prescription, or appropriation."

5. Appellant contends that the damages awarded him are so clearly inadequate that they must have been given under the influence of passion and prejudice. The jury awarded \$425. Appellant's farm is a dairy and stock farm. He has about one hundred acres of bottom hay land along the Otter Tail river. Under a top layer of sod is a few inches of sandy loam. Beneath this is a layer of coarse sand from two to four feet deep, running down it is claimed to water, and underneath this is a layer of quicksand. The theory of appellant is that the grass roots get their moisture from the water below and that the hay crop depends on a high stage of water in the river which irrigates the whole of the bottom land by a process of capillary attraction or sub-irrigation, and that the drawing of water from the river by removing this source of irrigation causes damage to his land.

The damages were hard to estimate. The cases that have come before this and other courts involving damage due to the action of water have usually been cases of excessive flowage. Cases of excessive drainage of bottom land are rare. We say this not to belittle appellant's claim, for there is credible evidence to sustain his claim of substantial damage, but rather to indicate how little guidance we have in precedent in passing upon such a claim. The jury and most of the witnesses doubtless labored under the same difficulty. The evidence as to damage took a wide range. It covers several hundred

pages of the record. No useful purpose would be served by analyzing it in detail. There is some testimony that appellant's land was benefited as much as \$2,000, some that there was no damage. Some witnesses who considered that appellant's property was damaged placed his damage at \$200. Several others placed it at but a few hundred dollars; and there was testimony of others placing it at all the way up to \$5,000. The jury was doubtless composed largely of farmers. They viewed the locality. There is evidence to sustain their finding that appellant's damage did not exceed \$125; and, while under the evidence they might have placed it higher, we see no possible ground for any claim of actual passion or prejudice against this appellant and in favor of the petitioner, and we cannot disturb the verdict.

Judgment affirmed.

---

## STATE v. CHRISTIAN F. VIRGENS.<sup>1</sup>

February 19, 1915.

Nos. 18,711—(1).

### **Criminal law — evidence — books and records of foreign corporation.**

1. The books and records of a large mercantile establishment, situated outside the state, when properly identified as the books and records kept in the usual course of business, may be received in evidence in a criminal trial without being verified by the clerks who actually made the entries. It is for the trial court to determine whether sufficient foundation for the introduction of such books has been laid, and the ruling will not be reversed unless abuse of judicial discretion is made to appear.

### **Opinion evidence.**

2. A witness who has observed the appearance and manner of speech of a

<sup>1</sup> Reported in 151 N. W. 190.

---

Note.—The authorities on the general question as to the admissibility of non-expert opinion as to mental capacity are gathered in a note in 19 L.R.A. 721.

person may therefrom be permitted to testify to the opinion formed concerning the mental state of such person.

**Cross-examination of defendant.**

3. Defendant on trial for murder, by the cross-examination of the state's witnesses, insinuated that a witness and defendant's wife desired conviction; and when defendant took the stand he accused them of criminal intimacy. In this situation, it was proper cross-examination of defendant to elicit that he claimed that, at the time of the commission of the crime, his wife was with him at home, and no impropriety in asking him in view of his accusation if he would consent to the wife testifying.

**Address of county attorney — allusion to desired witness.**

4. It was not misconduct of the county attorney, in his opening address, to state what he expected to prove, and which he did prove without objection. Nor was it prejudicial misconduct of such attorney, in his closing address, to allude to the desire of the state to have had defendant's wife as a witness under the circumstances of this case. An improper reference to the change of venue was rendered harmless by the court's instruction not to consider it.

**Charge to jury — verdict.**

5. The court's charge was correct, and the evidence, though circumstantial, sustains the conviction.

Defendant was indicted by the grand jury of Martin county, tried in the district court for Faribault county before Quinn, J., and a jury, and convicted of the crime of murder in the first degree. From the judgment of conviction, sentencing defendant to imprisonment in the state prison for life, defendant appealed. Affirmed.

*Albert R. Allen and S. D. O'Neill*, for appellant.

*Lyndon A. Smith*, Attorney General, *John C. Nethaway*, Assistant Attorney General, and *E. C. Dean*, County Attorney, for respondent.

HOLT, J.

Christian F. Virgens was indicted, tried and convicted of murder in the first degree, the victim being John Steen.

John Steen was a middle aged farmer residing upon a farm about a half mile east of the village of Triumph, Martin county, this state. His home had been there for many years. About 10:30 o'clock in

the evening of May 7, 1913, he left the bedroom of his wife, lit a lantern, and went to his hog-house to care for a brood-sow. Early the next morning he was found dead in one of the pens. Death came from a bullet which entered the top of his head, passed down through the brain and lodged near the right clavicle. The testimony is such that it excludes all possible theories that the wound was self inflicted or accidental. Unquestionably John Steen was the victim of a cold-blooded murder and the only propositions to be considered on this appeal are: Does the properly admitted evidence warrant the jury in finding the defendant guilty thereof, and was there a fair trial, free from prejudicial error?

The defendant was a farmer, 37 years of age. He owned a valuable 160-acre farm, adjoining John Steen's on the east and had resided thereon for eight years prior to the homicide. He had been married about two years, and his wife was 21 years old. Evidence was adduced tending to show that defendant considered John Steen meddlesome and disposed to injure him; that to Steen's interference he attributed his failure to marry a certain woman previous to his engagement to his present wife; that he believed Steen let loose a stallion owned by defendant whereby one of his geldings was injured; that, in both a criminal and civil proceeding against defendant, Steen had been a witness for the prosecution; and that defendant had made threats that John Steen ought to and should feel the effect of defendant's guns.

True, some of these threats were remote, and there was also testimony of neighborly acts between the two, such as Steen going on defendant's bond when under arrest for another affray, lending money back and forth, and that defendant oiled Steen's windmill, and let him hire a work horse. But defendant admitted that there was no intimacy between the families, or friendly visits. Defendant's dwelling was about half a mile almost directly east of Steen's hog-house. The hog-house was evidently roomy and modern. It had four windows. It was divided up into pens, 8 feet by 10 feet in size, with a passage running north and south between them. The pen wherein Steen was found was directly in front of the south window on the west side. Opposite, on the east side, was a window.

A lighted lantern placed or hung in that pen gave a light plainly visible at defendant's home and yard. The evidence tended to prove that the one who shot Steen stood outside the west window of the hog-house upon a low platform, and held the pistol within a very few inches of the window-pane, for the bullet shattered the glass considerably. Steen must have been in a kneeling or sitting posture and within three or four feet of the muzzle of the weapon. This is indicated by the wound and the position in which he was found. The bullet taken from his body was fired from a Savage 32-caliber automatic pistol produced at the trial. The gun experts who testified, and who had experimented with this particular pistol, leave this fact so clearly established that defendant's counsel does not question the same. The markings upon the bullet found in the body correspond so accurately to the markings made by this weapon upon the bullets fired from it that the demonstration is complete. The same kind of bullet or cartridge may also be used in a 32-caliber Colt automatic pistol, but the rifling in the Colt is clearly distinguishable from the Savage and consequently a gun expert can readily detect from which weapon the bullet has been fired.

On May 8, when the murder was discovered, the county attorney, sheriff and others in the community began to search for clues which might detect the murderer. Tracks from a person running, and wearing number 10 rubber boots, led south from the hog-house over a few rods of recently cultivated ground to a strip of sod where was a row of willows. They could be traced no further. In the afternoon of that day defendant was seen driving a pulverizer, or disc-harrow, in a line from his barn, a few rods south of his house, towards the Steen farm and nearly opposite to the buildings thereon. The ground was not in fit condition to be worked, being wet and soggy. After one or two turns he unhitched and took the horses to the barn. About that time the sheriff with some other persons drove up to defendant and stated that they were collecting the guns from the neighbors to see whether any clue to the criminal might thereby be obtained. The testimony is that defendant at first appeared to be very nervous. He denied that he had or ever had anything but a shot-gun. The next day the sheriff again drove up to defendant's

farm. He was then working in the field and the sheriff asked and obtained permission to measure his rubber-boots, which measurement corresponded with the tracks before mentioned.

May 17, the sheriff, a private detective, a court reporter, and a driver came to defendant's home and arrested him. He resisted so vigorously that it required the combined strength of the four men to place handcuffs on him. He was placed in the jail at Fairmont. In the meantime his nephew, Fred Reim, had been induced to come from near Albert Lea to Fairmont to aid the authorities. Fred Reim was about 20 years of age. In August, 1912, he came from his home in Oklahoma to visit relatives in Minnesota. He assisted defendant a few days in stacking, went in company with him to the state fair, then helped a day or two in threshing, and made short stays later, one being in February, 1913. Reim knew that defendant had owned the Colt pistol but not the Savage. He testified that defendant always carried the Colt pistol wrapped in a red bandanna handkerchief, in his left hand trouser pocket; that he had expressed the wish that John Steen might feel its effect; and that he harbored ill-will towards Steen, believing himself wronged by him. At the instigation of the sheriff and officials, Reim visited the defendant and informed him that several hundred people were searching his premises for fire-arms, that they intended to procure a powerful dip needle by which steel could be detected even when hid four feet under the ground, and suggested that defendant better tell him, Reim, where the gun was hid so that he might carry it away and remove the incriminating evidence. After a long interview Reim was told that the pistol was hid near a certain fence post on the south line of the farm. That night the sheriff, county attorney and Reim drove out to the farm and found the Colt pistol at the spot indicated, greased and wrapped in a piece of old heavy underwear. The next evening Reim had another interview with defendant and then succeeded in ascertaining where the ammunition was hid. Guided by this information, a search was made the following day, and, along the line where defendant was seen discing on the afternoon of May 8, there was found, in a fence-post hole, a beer bottle and, in another post hole

near by, a glass fruit jar. In the bottle and jar were about 200 cartridges fitting a Savage or Colt 32-caliber automatic pistol.

In September following a young man, Thaxter Edman, son of the farmer occupying the farm immediately south of defendant's, was building a fence north to join the line fence. The post in the line fence, at the point where the new fence was to join, had rotted off near the ground and was supported only by the wires to which it was attached. The young man undertook to bore a new post hole at the side of the old. The auger struck a hard substance some eight inches down. This proved to be a 32-caliber Savage automatic pistol. It had been greased and wrapped in a red bandanna handkerchief and a piece of underwear of the same kind found wrapped around the Colt. Both pistols were found under the same line fence. The one near the first or second post east of a ditch and the other about the same distance west. The defendant gave as an excuse for having denied ownership of any pistol or revolver, and for having hid the Colt gun and the cartridges, that he was afraid their possession would cast suspicion upon him. He admitted having ordered the Colt from Sears, Roebuck & Co., a Chicago catalogue house, in 1911, and the proof was plenary that he had done so. But he denied having bought, owned or hid the Savage pistol.

As stated above the evidence amounts almost to a conclusive demonstration that the bullet which killed John Steen was fired from the Savage pistol found by Thaxter Edman. It was therefore very important to trace the purchase or ownership thereof to defendant. His father's name was C. Virgens and he lived near the village of Welcome, 8 or 9 miles from defendant's farm. The state claims to have established that defendant, on February 22, 1912, receipted for an express package in Exhibit 31, the receipt book of the express company kept in its office at Welcome. The package was of the same weight substantially as the package in which the Colt was expressed to him. The middle initial of defendant's name does not appear in either the address or signature in Exhibit 31. But, from the testimony of persons familiar with defendant's handwriting and from a comparison of his admitted signatures, the conclusion is clearly warranted that defendant receipted for the package at Wel-

come, although he strenuously denied that he ever received or receipted for any express package at that place. The defendant admitted that his father, C. Virgens, who was living in February, 1912, but died prior to the homicide, could not have signed the express receipt. Neither of his two brothers, who resided near Welcome, nor any other relative was called to the witness stand. The state contends that the proof established the fact that the package receipted for contained this very Savage pistol purchased from and sent by the John M. Smythe Merchandise Co. of Chicago, a catalogue house.

The errors assigned and urged as ground for reversal relate: (1) To rulings upon the admission of evidence tending to show that the Savage pistol, Exhibit 20, was in the express package receipted for by C. Virgens in February, 1912; (2) permitting witnesses to testify to the manner of speech and appearance of defendant; (3) allowing the county attorney to so cross-examine defendant that the jury learned that Mrs. Virgens could disclose facts bearing directly and almost conclusively upon defendant's guilt or innocence; (4) misconduct of the county attorney; and (5) errors in the charge.

Fred Brotzman, for seven years in the employ of the John M. Smythe Merchandise Co. of Chicago, Illinois, was called by the state and testified that he was in charge of the sporting goods department of the company, and that it kept a record of every firm-arm sold. That he had this record for the month of February, 1912, in court, being Exhibit 26. He fully explained the company's system of bookkeeping and identified Exhibits 24, 25 and 27 as parts thereof. Exhibit 24 was an index card, Exhibit 25 the cash book and Exhibit 27 the express receipt for goods shipped out. By numbers from the system he could trace a firm-arm from one to the other of these records. Exhibit 31 was the American Express Company's delivery receipt book, signed by C. Virgens as above stated, and Exhibit 32 the monthly report of the express agent at Welcome accounting for the package to the Great Northern Express Co., the receiving express company at Chicago. The testimony of Brotzman disclosed that the John M. Smythe Merchandise Co. did a very

extensive business; that the mail orders accumulate so rapidly that it has been found advisable to destroy them at the expiration of three months after being filled; that the card indexes and the other records of the company are so kept as not to be accessible except to a certain person in charge thereof; that the witness was familiar with the system and could identify the exhibits mentioned as those of the company, but could not state by whom the entries were made except in the case of Exhibit 26 which was, to his knowledge, in the handwriting of the person authorized to make it. At the time the exhibits were being collected to bring to this state for use at the trial, there was written upon Exhibit 26 a number and a circle drawn around it. This number was no part of the exhibit and did not destroy its admissibility. It was placed there merely for convenient reference. The numerous clerks in this large establishment were outside of the court's jurisdiction. Neither the John M. Smythe Merchandise Co. nor the witness Brotzman had any interest, financial or otherwise, in the result of this prosecution. The records of that company, made and kept as a part of its system of doing business, were produced and indicated that a Savage 32-caliber automatic pistol of the same serial manufacturer's number as Exhibit 20, found near the fence post by Thaxter Edman in September, 1913, was sold, packed and delivered to the Great Northern Express Co. on February 17, 1912, at Chicago for shipment to C. Virgens at Welcome, Minnesota. The manner of keeping these exhibits, the necessity for accuracy, the exceeding improbability that the entries thereon were made by any one except by the duly authorized person, cognizant at the time of the correctness of the entry or of the data from which it was made, assure veracity and point to the exhibits as the most reliable testimony concerning the whereabouts of Exhibit 20. Indeed, had the clerk who packed and delivered the pistol to the express company been placed on the witness stand, it is wholly improbable that he could have remembered a solitary thing about the transaction, and could only have testified that the entry on some records made at the time was in his handwriting. So that, after all, the records, properly identified, were the best evidence obtainable of the transaction. Whether the books or records offered were sufficiently identi-

fied as the books and records made and kept in the usual course of the business and thus a proper foundation for their introduction laid, was for the trial court to determine. We see no reversible error or abuse of discretion in his rulings. The rule he applied was sanctioned in *Swedish American Nat. Bank of Minneapolis v. Chicago, B. & Q. Ry. Co.* 96 Minn. 436, 105 N. W. 69; *Strand v. Great Northern Ry. Co.* 101 Minn. 85, 111 N. W. 958; *Wigmore, Evidence*, p. 1895; *Fielder v. Collier*, 13 Ga. 496. We do not find any merit in the contention that the witness Brotzman was erroneously permitted to state conclusions. He was familiar with his employer's business, the bookkeeping system, and the signs or numbers by which one record connected up with another in such system. In the light of this knowledge he had information and opinions not possible for the jury to obtain by the mere inspection of the books.

Permitting witnesses to testify as to the manner of speech and appearance of defendant under circumstances where an accusing conscience would be likely to betray evidences of guilt was not error. 1 Dunnell, Minn. Digest, § 3315.

Defendant took the witness stand, denied guilt, and asserted that on the night of the homicide he was at home. It was but legitimate cross-examination to bring out in whose company he spent the night. He maintained that he was continuously in his wife's presence. By the cross-examination of the state's witness, Fred Reim, and by defendant's direct examination, his counsel sought to show that criminal intimacy existed between Mrs. Virgens and Reim, that Reim might be the murderer and that it would serve the dark desires of the two to fasten the crime upon defendant. This was an attempt to justify the nonproduction of the wife as a witness, and to leave the impression with the jury that he was the victim of an atrocious plot. In this situation, the state by failing to request his consent to use Mrs. Virgens as a witness would admit defendant's aspersions. We have lately held in *State v. Roby*, *supra*, page 187, 150 N. W. 793, that it was not reversible error to permit the state to request the defendant in a criminal prosecution to consent to his wife testifying. The case at bar is much stronger. Indeed, the course defendant and his counsel pursued made it permissible, if not almost

imperative cross-examination, to ask defendant whether he would consent to the state placing his wife upon the witness stand.

Defendant accuses the prosecuting attorney of misconduct in several respects. We have already considered the complaint in respect to the cross-examination of the defendant. In opening the case to the jury the county attorney stated that the state would prove that defendant told Fred Reim that his wife had told the county attorney everything she knew. Fred Reim so testified, without objection, and was not even contradicted by defendant. In the closing address the county attorney said: "The defendant tells you that he was home on the night of May 7. Now, gentlemen, there are only two persons who know whether he was home or not. He was living there alone with his wife. He has gone on the stand and given his testimony. We would like to have had the testimony of the other person who was there and knows whether he was home or not." We have already considered the cross-examination of the defendant, revealing the whereabouts of his wife and his claim that he was with her when the homicide occurred, proper; that being so, the remarks quoted are not outside the record. In addition to the authorities cited in *State v. Roby*, *supra*, sustaining the course pursued by the county attorney we may give, *Wharton, Criminal Evidence* (10th ed.), § 435a, where it said "where the wife of accused is by statute made a competent witness, comment may be made on his failure to call her." The wife is not rendered incompetent by reason of our statute (section 8375, G. S. 1913). In *re Holt's Will*, 56 Minn. 33, 57 N. W. 219, 22 L.R.A. 481, 45 Am. St. 434. Also *State v. Millmeier*, 102 Iowa, 692, 72 N. W. 275; *Commonwealth v. Weber*, 167 Pa. St. 153, 31 Atl. 481.

The reference by the prosecutor to the fact that, because of supposed local prejudice, defendant had obtained a change of place of trial from Martin to Faribault county, though out of place perhaps, should not reverse the judgment in view of defendant's examination of the jurors on that score and the court's admonition to the jury not to let that circumstance in any manner weigh against defendant.

The trial court gave a clear and comprehensive charge. The arguments of counsel evidently occasioned and justified this instruc-

tion: "Now, gentlemen, considerable has been said upon the trial of this case with relation to defendant's property and where it might go in case he should be convicted, but, gentlemen, those matters have no concern with you; you are not concerned in the least where the property might go in case he should be convicted in this case, except insofar as the disposition of that property might affect the credibility of any of the witnesses testifying." No vice is perceived in the instruction.

We have endeavored to examine the record, including exhibits, with the great care which the gravity of the case demands. The evidence is wholly circumstantial, but we entertain no misgivings that the jury went wrong. No prejudicial error is found in the assignments not herein specially mentioned. Our conclusion is that the conviction must stand.

Judgment affirmed.

---

STATE ex rel. GUSTAVE KAFKA v. DISTRICT COURT OF  
RAMSEY COUNTY and Another.<sup>1</sup>

February 19, 1915.

Nos. 18,941—(173).

**Eminent domain — damages — apportionment.**

1. Where several persons have separate estates or interests in a single tract or parcel of land taken in condemnation proceedings, the proper mode of reaching a fair valuation of the property and of ascertaining the damages of those interested, is to treat the property as though the entire estate and all interests therein were in a single person and to find the value and damage in gross, leaving the apportionment of the award to be thereafter made according to the previous interests of the parties in the property.

<sup>1</sup> Reported in 151 N. W. 144.

---

Note.—The question of the rights of tenants and reversioners of property taken by eminent domain is discussed in a note in 21 L.R.A. 212.

**Same — validity of award.**

2. Neither a separate assessment of damages to the several interests in the property nor a subsequent apportionment of the gross award is essential to the validity of the assessment, unless such is required by statute.

**Charter of St. Paul — recovery of award.**

3. Section 251 of the St. Paul City charter in force in 1913, makes the compensation awarded a public charge, so that it may be recovered by the property owner with sufficient certainty to comply with the constitutional requirement of security of compensation.

**Same — award to lessee of property condemned.**

4. Section 247 of the charter, providing that "if the lands and buildings belong to different persons, or if the land be subject to lease, the damages done to such persons, respectively, may be awarded to them by the board of public works, less the benefits resulting to them, respectively, from the improvement," held not to require the board either to make a separate assessment of relator's interest in the property as lessee, or subsequently to apportion to him his share of the gross award.

**Same.**

5. Nor was such required under the terms of sections 251, 253.

**Payment of award — constitutional right of lessee.**

6. Payment by the city of the gross award to the fee owner did not deprive relator, as lessee, of his constitutional right of security of compensation for the taking of his property; for, while his right of recovery against the fee owner does not fulfil the constitutional guaranty, the fund must be deemed as still in the hands of the city, subject to be brought into court for apportionment at the instance of relator, of whose claim the city had notice before paying the fee owner.

Upon the relation of Gustave Kafka this court issued its writ of *certiorari* to review the decision of the district court for Ramsey county, Brill, J., confirming an assessment made by the board of public works of the city of St. Paul for property condemned for the purpose of widening a street. Affirmed.

*Durment, Moore & Oppenheimer*, for relator.

*O. H. O'Neill* and *J. P. Kyle*, for respondents.

*B. H. Schriber*, as *amicus curiae*, filed a brief.

[PHILIP E. BROWN, J.]<sup>1</sup>

*Certiorari* to review a judgment entered on relator's appeal confirming an assessment made by the board of public works of the city of St. Paul, in the exercise of the right of eminent domain. The findings of the trial court forming the basis of the judgment are unchallenged, and may thus be summarized:

In 1913 relator was in possession, as lessee, of the ground floor of a building abutting on Robert street, with the right of so continuing for four years longer. In that year the city took some of the land underlying the building for the improvement of this street. The proceedings therefor were in all things regular up to the time of the assessment by the board of public works, and the latter had jurisdiction to make the assessment of damages caused by the taking and the benefits accruing from the improvement. While these matters were pending and before confirmation of the assessment, relator seasonably claimed that a separate award of damages to his leasehold interest be made to him, but the board refused and, instead, fixed a fair valuation of the property as a whole and fairly and impartially assessed a sum in gross as damages and compensation for the taking, including all interests therein. No apportionment of this amount was made between relator and the fee owners; and later the city paid to and the latter accepted the entire sum so awarded. Judgment confirming the assessment was ordered and entered.

Section 250 of the city charter provides that on appeal to the district court from an order of the board of public works confirming as assessment:

"The only question to be passed upon shall be whether the said board of public works had jurisdiction in the case, and whether the valuation of the property specified in the objections is a fair valuation, and the assessment, so far as it affects such property, is a fair and impartial assessment. The judgment of the court shall be either to confirm or annul the assessment in so far as the same affects the property appropriated aforesaid of the said appellant."

Relator contends that the procedure adopted by the board was

<sup>1</sup> See *Per Curiam* order on page 440.

irregular and not in accordance with the charter, wherefore his property was appropriated without just compensation first paid or secured, in violation of Const. art. 1, § 13; that the assessment, insofar as it affects his property, was unfair and not impartial; and that he was entitled to a separate award or at least an apportionment of his interest in the gross amount allowed, so that he could either receive it or have its correctness reviewed on appeal; and, further, that without such apportionment he is without remedy to recover his compensation; the relief demanded upon these premises being that the district court should remit the award for re-assessment.

For the purposes of discussion it will be assumed that relator had valuable rights in the property condemned, entitling him to substantial compensation, and that he took all necessary preliminary steps to protect them. This brings us directly to the consideration of his claims as outlined above, in the course of which the inquiry obviously must be limited to matters pertinent within the limitations imposed by section 150 of the charter upon the scope of the hearing on the appeal. The other relevant provisions of the charter are as follows:

Section 243: "The said board of public works, in making said assessment, shall determine and appraise to the owner or owners the value of the real estate appropriated for the improvements, and the damage arising to them respectively from the condemnation thereof, which shall be awarded to such owners respectively, as damages, after making due allowance therefrom for any benefit which such owners may respectively derive from such improvements."

Section 247: "If the lands and buildings belong to different persons, or if the land be subject to lease, the damages done to such persons, respectively, may be awarded to them by the board of public works, less the benefits resulting to them, respectively, from the improvement."

Section 251: "The city of St. Paul shall thereupon cause to be paid to the owner of such property the amount of damages over and above all benefits which may have been awarded therefor within six (6) months after date of the confirmation of such assessment, with interest at the rate of seven (7) per cent per annum."

Under the ruling of *Moritz v. City of St. Paul*, 52 Minn. 409, 415, 54 N. W. 370, these provisions do not purport to require the board of public works to assess the damages or apportion the award separately to each person, unless, as has been suggested, a contrary conclusion is justified by the difference in the wording of the charters under which the assessment therein involved and the one here in question were respectively made, whereby, it is insisted, under the latter the damages to the persons should be considered instead of to the property as under the former. It is settled, however, that condemnation proceedings are *in rem*, against the property, for which the award, when made, stands as belonging to those formerly having interests in the property and in the same proportion. *Smith v. City of St. Paul*, 65 Minn. 295, 297, 68 N. W. 32; *Eyre v. City of Faribault*, 121 Minn. 233, 141 N. W. 170. And we are not persuaded that the proceedings were intended to be otherwise, especially as the permissive form of section 247 negatives, rather than strengthens, any implication of mandate from the frequency and manner of reference to the "owner" in the other sections. Hence the only theory on which it could be held that the board were required to make a separate award to relator or to apportion his share of the gross award is, as claimed by him, that under the holdings of *Bowen v. City of Minneapolis*, 47 Minn. 115, 117, 49 N. W. 683; *Johnson v. Northwestern L. & B. Assn.* 60 Minn. 393, 62 N. W. 381, and *State v. District Court of Ramsey County*, 75 Minn. 292, 77 N. W. 968, we must construe the word "may" in section 247 as mandatory, in order to sustain the proceedings against constitutional objections and to preserve relator's constitutional and other rights. This construction cannot, of course, be indulged in save for imperative reasons (*Medbury v. Swan*, 46 N. Y. 200); and as those here presented largely involve the specific constitutional objections interposed by relator, the determination of the latter will in great measure test the sufficiency of the former.

Whether separate awards are necessary under circumstances such as here disclosed has never heretofore been considered by this court. The question was raised, but not decided, in *Smith v. City of St. Paul*, *supra*. The uniform practice, however, has been, as we under-

stand it, to consider the property about to be condemned as an entire estate, so far as concerns the public, the fee owner, and those having lesser interests therein. All persons are made defendants whose interests are to be foreclosed; but this is done, not for the purpose of determining questions of title between them, but so that they may be heard upon the issues of the right to condemn and the amount of damages to be awarded in gross. While, therefore, apportionment and separate awards are often convenient and beneficial where several persons own interests in a single tract or parcel of land, and while, furthermore, such are quite commonly made where the proceedings are in a court or tribunal having power and capacity to inquire into the variant interests, even in the latter case the well nigh universal mode of reaching a fair valuation of the property and determination of the damages, is to consider the property as though the entire and undivided estate and all interests in the property were in a single person, and to find the value and damage in gross, thereafter apportioning the amount of the award thus arrived at between the various parties according to their interests. *Edmands v. City of Boston*, 108 Mass. 535; *Crane v. City of Elizabeth*, 36 N. J. Eq. 339; *Lambert v. Giffin*, 257 Ill. 152, 158, 100 N. E. 496; *Harris v. Howes*, 75 Me. 436; 2 *Lewis*, Em. Dom. §§ 716, 719. And neither a separate assessment nor a subsequent apportionment of a gross award is necessary to render the assessment valid under constitutional limitations relative thereto; being, unless required by statute, wholly immaterial to the regularity and completeness of the condemnation, except as bearing upon compliance with constitutional provisions relative to payment or security of the award to the persons entitled thereto as a condition precedent to the condemnor's title or right of possession, which we will discuss later. *Cornell-Andrews Smelting Co. v. Boston & P. R. Corp.* 209 Mass. 298, 95 N. E. 887; *Id.* 215 Mass. 381, 102 N. E. 625; *Pittsburg & S. R. Co. v. Hall*, 25 Pa. St. 336; *Davidson v. Texas & N. O. R. Co.* 29 Tex. Civ. App. 54, 57, 67 S. W. 1093; *Rabb v. La Feria Mut. Canal Co.* (Tex. Civ. App.) 130 S. W. 916; *Bentonville R. R. v. Stroud*, 45 Ark. 278, 279; *San Francisco & S. J. R. Co. v. Mahoney*, 29 Cal. 112, 119; *Crane v. City of Elizabeth*, *supra*; *Lambert v. Giffin*, *supra*; *United*

*States v. Dunnington*, 166 U. S. 338, 13 Sup. Ct. 79, 36 L. ed. 996; 10 Am. & Eng. Enc. (2d ed.) 1099. As said in *Edmands v. City of Boston*, supra, 644:

"The situation of the estate and the manner of its occupation are doubtless to be taken into consideration in estimating the injury caused by disturbing that occupation. But between the public and the landowner it is but one estate. \* \* \* A fair compensation for the property taken and injury done, ascertained by general rules, is a substitute to the owners for that of which they are deprived. That is the whole of the transaction with which the public is concerned. The apportionment is merely a setting out to the several owners of partial interest of their corresponding rights in the fund which has been substituted for the property taken."

We conclude that a mandatory construction of the word "may" as used in section 247 of the charter is not demanded by any consideration touching the validity of the assessment; which conclusion is strengthened by the mandatory form of the provisions of section 246.

This brings us to the question whether the failure to apportion to relator his share of the award deprived him of the security of payment guaranteed to him by the Constitution. In the case of *In re Lincoln Park*, 44 Minn. 299, 302, 46 N. W. 355, it was said:

"Unless there is certainty that it (the compensation) will be paid, or unless it is made a public charge, so that it may be obtained in due course through the aid of the courts without unreasonable delay, there is no adequate provision for obtaining compensation."

But in *State v. Otis*, 53 Minn. 318, 55 N. W. 143, it was held that a provision of the city's charter then in force, identical with section 251 of the charter under which the present assessment was made, was held to constitute a sufficient compliance with the conditions declared as above quoted, and to be a sufficient provision for compensation.

Relator urges, however, that as the award has been paid to the fee owner, he is without remedy, especially as in the absence of an apportionment of his share he cannot proceed against the city therefor. On the other hand respondent insists that relator's remedy against the

fee owner fulfils the constitutional requirement of security of compensation. Neither of these contentions can be sustained; for while a right of recovery against an individual does not constitute the security contemplated by the Constitution, the city could not, with notice of relator's claim, foreclose his right to his share of the award by paying the whole to the landowner; wherefore, to such extent as is necessary to conserve his rights in the premises, the fund must be deemed to be still in the city's possession; and relator's right to have it brought into court for apportionment is a sufficient remedy to enable him to obtain compensation for the taking of his property, "in due course through the aid of the courts without unreasonable delay." *In re Lincoln Park*, *supra*; *Crane v. City of Elizabeth*, *supra*; *North Coast R. Co. v. Hess*, 56 Wash. 335, 338, et seq., 105 Pac. 853; *United States v. Dunnington*, *supra*.

Nor can we hold that general considerations of justice and equity required the board to exercise the power vested in them by section 247 of the charter. To so declare would be to ignore the necessarily limited capacities of such boards. The value of a leasehold interest depends upon such a variety of circumstances that in many cases the machinery of a board of such limited jurisdiction and circumscribed functions would be entirely inadequate to meet the requirements of such an investigation. Certainly, upon this record, it cannot be said that the apportionment of relator's share of the award was such a simple matter as to render the board's failure to attempt it arbitrary and unreasonable. Defendant's point in this connection that the failure to make him a separate award precluded him from appealing upon the question of its fairness and sufficiency is concluded by the court's finding that the gross award was ample as to all interests. Furthermore, as a party interested in the gross award, he had the right to appeal therefrom, notwithstanding that his share had not been apportioned; for, as we have seen, the only question of damages as between him and the city as condemnor was the amount of the gross award, in which he is entitled to share in proportion to his previous interest in the property. See *Spaulding v. Milwaukee L. S. & W. R. Co.* 57 Wis. 304, 309, 14 N. W. 368, 15 N. W. 482.

## PER CURIAM.

For the reasons given in the foregoing opinion, prepared by the late Justice Philip E. Brown, in accordance with the conclusions reached by the court, the judgment is affirmed.

---

HELMER CARLSON v. JAMES T. ELWELL<sup>1</sup>

February 19, 1915. -

Nos. 18,982—(207).

**Release — evidence.**

Evidence considered and *held* not sufficient to warrant submitting to the jury the question whether plaintiff was mentally incompetent, or did not know what he was doing, when he received money paid by the defendant in settlement of his claim for personal injuries and executed a release.

Action in the district court for Hennepin county to recover \$40,000 for personal injuries. The case was tried before Leary, J., who when plaintiff rested denied defendant's motion to dismiss the action, and a jury which returned a verdict in favor of plaintiff for \$15,000. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed and judgment for defendant ordered.

*David F. Simpson, George S. Grimes and Gordon Grimes*, for appellant.

*Olof L. Bruce, William A. Tautges and Brooks & Jamison*, for respondent.

BUNN, J.

This action to recover for personal injuries resulted in a verdict for the plaintiff. Defendant appeals from an order denying his motion in the alternative for judgment notwithstanding the verdict or for a new trial.

<sup>1</sup> Reported in 151 N. W. 188.

In January, 1910, defendant was the owner of a lot at the corner of Fifth street and First avenue in Minneapolis. He decided to erect a building thereon. Plaintiff was a workman employed in the work of excavating. Whether the work was done by defendant or by an independent contractor, whether plaintiff was in defendant's employ, or in the employ of an independent contractor, is one of the questions in the case. Plaintiff was employed about February 8, 1910, and worked with other men in shoveling dirt into wagons in the excavation. He was injured February 14, 1910, while working near the Fifth street side of the excavation, by a heavy, frozen chunk of earth that fell out of the bank at the top and down to the bottom of the excavation. Whether there was evidence tending to show negligence on the part of defendant, and whether plaintiff assumed the risk, are questions that were involved on the trial and argued here. Plaintiff's injuries were undoubtedly serious. When he was extricated from under the frozen earth he was taken to the City Hospital, where an operation was performed. He was delirious for several weeks after this, had a high fever and septic poisoning. After the accident and in the month of February Ayres & McDonald, Minneapolis lawyers, secured a contract from plaintiff to take his case on a 50 per cent contingent fee. On May 11, 1910, Mr. Clinite, a lawyer then in the office of Ayres & McDonald, visited the plaintiff at the hospital and procured his signature to the contract. Clinite testified that on this occasion plaintiff talked about the case, giving the names of witnesses. Clinite then took charge of the claim. He visited plaintiff several times and in these conferences and in conversations with him over the telephone, he and plaintiff discussed the facts in the case and the progress of the investigations made. Clinite testified that plaintiff said he wanted to get his claim settled, and asked him to find out how much the defendant would give. Clinite then saw defendant, who refused to pay anything, claiming that plaintiff was not in his employ and that he was not liable. After several visits to defendant he succeeded in getting an offer of \$100. This offer was submitted to the plaintiff, who instructed Clinite to take \$200 if defendant would give it. After several efforts to get defendant to pay more, he finally agreed to give \$400 in settlement of the claim.

Clinite reported this offer to plaintiff and, though he advised against its acceptance, plaintiff was anxious to make the settlement and accepted the offer. A few days later and on July 25, 1910, Clinite and the defendant met the plaintiff at the hospital. Defendant paid plaintiff \$400 in bills; plaintiff counted the money and signed a written release which had been prepared by Clinite and the terms and effect of which were explained to plaintiff. Defendant then left and plaintiff paid to Clinite \$200 of the money, retaining the balance himself. Such is the substance of the testimony of Clinite, supported by that of defendant and that of Mr. Cutler, an employee in the office of Ayres & McDonald. It is in no way contradicted, except by the testimony of plaintiff that he did not remember any such transaction.

Three main questions were argued by counsel. Two of them have been stated; i. e., the question whether plaintiff at the time of his injury was in the employ of defendant or in the employ of an independent contractor, and the question whether there was evidence of negligence. The third question and the one that must be decided in plaintiff's favor, in order that he may have any standing in the case, concerns the validity of the settlement and release. Unless this be set aside, plaintiff is precluded by it, and the other questions become immaterial.

No fraud in the settlement is shown or seriously claimed. The sole ground for avoiding it is the claim that plaintiff was at the time mentally incapable of understanding the transaction, and did not in fact know what he was doing. We say this advisedly, not overlooking the argument of inadequacy and other considerations. It is very clear that Clinite represented plaintiff and that defendant, so far from making any effort to secure a settlement, insisted that he was not liable at all. He was only induced to offer the \$400 after repeated attempts of Clinite to induce him to pay something. The amount was inadequate, it is true, if the liability was at all clear. But it was very far from clear that plaintiff was in defendant's employ at all or that there had been any negligence in doing the work. These questions are even now, after exhaustive efforts of counsel, at least doubtful ones. It is therefore plainly correct to

say that the settlement must stand, unless the evidence justified the jury in finding that plaintiff's mental condition at the time was such that a contract with him was absolutely void.

The inquiry must therefore be directed to the mental condition of plaintiff on July 25, 1910, when the settlement was made and the release executed. We have referred sufficiently to the testimony of Clinite, of defendant and of Cutler. There can be no doubt that their evidence, if true, shows that plaintiff understood exactly what he was doing. Physically he was then in a very serious condition, but this is by no means inconsistent with soundness of mind. On July 25, plaintiff's temperature was 97½ in the morning and reached 100 late in the afternoon. He was in bed on the porch of the hospital. The witness McKenna was a patient at the hospital from March to September, 1910, and during most of this time had a bed next to plaintiff's. He testified to frequent talks with plaintiff, to his reading the papers, discussing the facts in his case, and the settlement made, all in a sane and normal way. Dr. Petit was an interne at the hospital, and was in charge of plaintiff from May 15 to September 15. He saw and talked with him daily. He testified that plaintiff talked fair English, and answered questions intelligently, though he seemed to lack education and appeared to be dull. Dr. Byrnes was an attending surgeon at the hospital, and plaintiff was under his care from July first. He performed an operation on July 18, to which he obtained plaintiff's consent. He testified that plaintiff did not talk much, was very quiet, appeared not to care whether anything was done for him, but that he was not delirious, apparently understood what was going on around him and answered questions intelligently. Dr. Collins was the superintendent of the hospital; he testified that plaintiff was irrational at times during the winter and spring, but that at other times he was rational and intelligent. This is all of the testimony that relates to plaintiff's mental condition at or about the date of the settlement, except the evidence of plaintiff himself. We will briefly review his testimony, as manifestly the verdict, if it can be sustained at all, must rest on the testimony of plaintiff himself.

He remembered being taken to the hospital and being placed on the

operating table, but claimed to remember nothing else until the middle of May, when he recalls being moved to the porch. From this time to July 18, he realized his condition and his surroundings, and was able to describe both; his memory was apparently good, except as to anything in regard to the visits of Clinite, or any talks with him or anybody about his claim. The operation of July 18 was to remove an accumulation of pus; plaintiff remembered this operation, and the fact that he did not take an anesthetic. The doctors testified that this operation relieved plaintiff—lessened his fever—but plaintiff claims to have lost consciousness again and to remember nothing else until after an operation in September. He testified that he did not remember ever seeing Clinite, any talk about his claim, or anything at all about executing the release or receiving the money. There is no possible doubt that he did execute the release and receive the money, and his evidence goes only to his memory of these things. Some time after the settlement (just when does not appear), plaintiff, according to his testimony, discovered under his pillow a purse containing two hundred dollars in bills. He had no idea how it got there and intrusted it to a friend for safe keeping. The friend made some investigation, and in September informed plaintiff that the money had been placed under his pillow by defendant. Later in the fall the friend returned the money to plaintiff, who kept it in the City Hospital during the rest of his stay there and took it with him when he left for another hospital about the first of the year. He was in this hospital until spring when he was discharged and went to school for a time, using the two hundred dollars for expenses. He never attempted to see defendant or made any further inquiries as to how the money came or why. Dr. Collins testified that plaintiff applied to him for employment in the spring of 1912, which plaintiff admits, and that plaintiff then said that he had settled his claim for damages for four or five hundred dollars, of which he had got half. This plaintiff does not remember. This action was commenced in March, 1913, nearly three years after the settlement, and two and a half years after plaintiff, on his own evidence, knew that the money had come from defendant.

We see no escape from the conclusion that the evidence is wholly insufficient to justify a jury in finding that plaintiff was mentally incompetent or did not understand what he was doing when he received the money and signed the release on July 25, 1910. Instead of being clear and convincing, the evidence to avoid this written instrument is wholly plaintiff's "I don't remember" repeated in various forms. Opposed to this is the testimony of many wholly disinterested witnesses, physicians, lawyers and laymen. The same may be said of plaintiff's claim that he did not understand English. It is so opposed to the overwhelming weight of the evidence that it cannot be given credence.

As we have said, the evidence wholly fails to show fraud. The liability of defendant was very doubtful; the negotiations for a settlement were begun by the attorneys of the plaintiff and the settlement agreed to by the defendant only after their repeated efforts. Under these circumstances mere inadequacy is not a badge of fraud, or alone ground for avoiding the settlement. In each of the cases relied on by plaintiff there was either evidence of fraud or satisfactory proof that the injured person was unable to understand what he was doing. *Schus v. Powers-Simpson Co.* 85 Minn. 447, 89 N. W. 68, 69 L.R.A. 887; *Sundvall v. Interstate Iron Co.* 104 Minn. 499, 116 N. W. 1118; *Marple v. Minneapolis & St. L. R. Co.* 115 Minn. 262, 132 N. W. 333; *Petterson v. Butler Bros.* 123 Minn. 516, 144 N. W. 407. The case at bar comes within the well understood rule that the testimony must be clear and convincing in order to set aside a written release. The evidence is so far from clear, so unconvincing, so wholly unsatisfactory, that we are obliged to hold that it was error to submit this issue to the jury. Judgment should have been ordered for the defendant. It is manifest that plaintiff can make no better case, that the evidence can never be more satisfactory. In view of the overwhelming evidence contradicting his claim of not remembering anything pertaining to a settlement and the failure to repudiate it until long after he had learned where the money came from and had spent it, it is a case where the litigation should be ended.

Order reversed and judgment for defendant ordered.

FLORENCE M. WATSON v. CITY OF DULUTH.<sup>1</sup>

February 19, 1915.

No. 18,997—(245).

**Unguarded sidewalk — injury to pedestrian — evidence of negligence.**

Evidence in an action against a city to recover damages for injuries resulting from a fall from an unguarded elevated sidewalk constructed along an embankment, *held* to show actionable negligence on the part of defendant.

Action by a minor, by her father, in the district court for St. Louis county to recover \$10,500 for injuries sustained by her in a fall from a sidewalk in defendant city. The case was tried before Fesler, J., and a jury which returned a verdict for \$5,000. Defendant's motion for judgment notwithstanding the verdict was denied. From the judgment entered pursuant to the order for judgment defendant appealed. Affirmed.

*Harvey S. Clapp and William P. Harrison*, for appellant.  
*Kenny & Kenny*, for respondent.

[PHILIP E. BROWN, J.]<sup>2</sup>

This is an action to recover damages for personal injuries sustained by plaintiff's minor daughter, alleged to have been caused by defendant's negligence. After verdict for plaintiff the trial court denied defendant's motion for judgment notwithstanding. Defendant appealed from the judgment thereafter entered.

On August 17, 1913, the date of the accident, East Fourth street was a much traveled highway in a populous section of the city of Duluth. A concrete sidewalk, of smooth construction, six feet wide, ran along its southerly side above the grade of the adjoining property, which sloped away from it. At the place where the accident occurred the top of the walk was 14 inches above the ground sup-

<sup>1</sup> Reported in 151 N. W. 143.

<sup>2</sup> See Per Curiam order on page 448.

porting it, which sloped away four inches in 26, or at a grade of one and one-half per cent; then, at a point nine feet from the top of the walk, the drop was four feet and eight inches, or a 47 per cent grade; and 11 feet out from the top of the walk the drop increased to six feet and three inches, the slope thereafter being gradual. At about 30 minutes past eight o'clock p. m., of the day mentioned, plaintiff's daughter, while walking on the sidewalk, inadvertently stepped off its edge, rolled down the slope, and suffered injury. It was dark and there were trees nearby with sufficient foliage to obscure artificial light. The sidewalk was unguarded either by a rail or otherwise.

Plaintiff's sole claim of negligence on defendant's part was that because of the embankment and slope immediately adjacent to the sidewalk a duty rested on the city, in order to make the walk reasonably safe for travel, to maintain a guard-rail or other protection, to prevent travelers from slipping off the walk and down the grade. Defendant insists that the contrary was conclusively established.

Defendant's duty required it to maintain its sidewalks in a reasonably safe condition for public use, and whenever, owing to the existence of embankments, reasonable prudence required the maintenance of railings or other suitable barriers to prevent accidents to persons rightfully using such walks, it was bound to provide them, or else be subject to liability to such persons for any injury proximately resulting to them from its failure in this regard. *Grant v. City of Brainerd*, 86 Minn. 126, 90 N. W. 307. Defendant, while conceding the general rule to be as stated, insists that it applies only to cases of dangerous embankments of an unusual character, whereby travelers are exposed to extraordinary hazards; that the proofs here establish that the drop from the sidewalk to the supporting ground was insignificant, as was also the embankment, so that it would be unreasonable to charge the city with the duty of providing a railing; that the topography of the city must be taken into consideration in determining whether it performed its reasonable obligations in the premises, and that to hold that it did not would require the guard-railing of numerous like places in the city, whereby great and unreasonable expense would be entailed upon the tax-

payers. It is also claimed that the custom of the city was not to guard-rail drops of less than two feet below the sidewalks; and finally that, at best, the injury resulted from a defective plan of construction not palpably unreasonable.

These contentions, so far as they bear upon the case in hand, may be shortly disposed of. The danger must, it is true, be of an unusual character to require a guard-rail; but whether such a condition exists in a particular case is usually a question for the jury and is seldom determinable as a matter of law. *City of St. Paul v. Kuby*, 8 Minn. 125, 130 (154); *Thompson v. City of Boston*, 212 Mass. 211, 98 N. E. 700. Whether the walk is in a populous portion of the city is an important consideration in this connection. *Grant v. City of Brainerd*, *supra*. Where the risk appears so negligible that it would be unreasonable to charge the city with the duty of maintaining a rail or guard, the court will declare, as a matter of law, the city's nonliability for injury caused by the absence of such protections. *McHugh v. City of St. Paul*, 67 Minn. 441, 70 N. W. 5; *Tarras v. City of Winona*, 71 Minn. 22, 73 N. W. 505. But in the present case we find nothing to warrant a holding, as a matter of law, that the embankment was not dangerous within the rule stated; nor can the expense incident to the city's performance of its duty avail as an excuse for nonperformance, safety of life and limb being the paramount consideration. Furthermore, compliance with a general custom does not of itself constitute due care or justify a negligent act. *Stash v. Great Northern Ry. Co.* *supra*, 329, 151 N. W. 124. Finally mere failure to guard-rail a sidewalk does not come within the doctrine under which a municipality is relieved from liability for injuries caused by a defective plan of construction; and if it did, under the undisputed facts defendant would not be thereby absolved. *Blyhl v. Village of Waterville*, 57 Minn. 115, 58 N. W. 817.

The question of proximate cause was also for the jury.

PER CURIAM.

For the reasons given in the foregoing opinion, prepared by the late Justice Philip E. Brown, in accordance with the conclusions reached by the court, the judgment appealed from is affirmed.

THOMAS DALY v. THOMAS A. CURRY.<sup>1</sup>

February 19, 1915.

Nos. 19,002—(223).

**Injury to passenger alighting from street car.**

1. Issues of defendant's and plaintiff's negligence in an action to recover damages for personal injuries, alleged to have been caused by defendant's negligent operation of an automobile whereby it collided with plaintiff just after he had alighted from a street car, *held*, under the evidence, for the jury.

**Opinion evidence—speed of machine.**

2. A business man of mature years, who saw the automobile as it passed the rear end of the street car and watched it until it stopped, was competent, without further qualification other than reasonable intelligence and ordinary experience in life, to give an opinion as to its speed, though he had previously testified that he had never theretofore attempted to estimate the speed of a passing automobile and could not state positively how fast the one in question was going.

**Verdict not excessive.**

3. Verdict for \$6,000 as damages resulting from the fracture of plaintiff's leg and other injuries, sustained.

**Taxation of disbursement—point not available on appeal.**

4. Defendant, having failed to question an allowance for expert witness fees which was set out as a disbursement in plaintiff's notice of taxation of costs, *held* precluded from objecting thereto on the ground that it was originally allowed by an *ex parte* order made by a district judge other than the one who tried the case.

Action in the district court for Ramsey county to recover \$25,000 for personal injuries. The case was tried before Steele, J., and a jury which returned a verdict in favor of plaintiff for \$6,000. De-

<sup>1</sup> Reported in 151 N. W. 274.

---

Note.—On the question of evidence as to speed of automobiles or other road vehicles, see note in 34 L.R.A.(N.S.) 778, note.

128 M.—29.

fendant's motion for judgment notwithstanding the verdict or for a new trial was denied. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

*Harris Richardson & Walter Richardson*, for appellant.

*Reed & Swift* and *W. A. McManigal, Jr.*, for respondent.

[PHILIP E. BROWN, J.]<sup>1</sup>

This is an action to recover damages for personal injuries suffered by plaintiff, alleged to have been caused by defendant's negligent operation of an automobile. Plaintiff had a verdict. After denial of defendant's alternative motion and entry of judgment, he appealed from the latter.

There was ample evidence to sustain findings to the effect following: On April 12, 1913, plaintiff, with several others, was riding as a passenger in the vestibule of a street car on University avenue, St. Paul. Defendant was following in an automobile owned and driven by him. The street car was running ordinarily, and in response to signals of passengers desiring to get off, was stopped in the usual and ordinary manner just beyond the street crossing on the proper side of the street. Several passengers alighted, after which plaintiff, without looking to see if any vehicles were near, stepped off, and when he had proceeded two or three feet was struck by defendant's rapidly approaching automobile, which he had not previously seen, and dragged under it some 60 feet or more, to a point about 10 feet past the front end of the street car, thus receiving the injuries here complained of. The street was wet and slippery.

1. The court submitted the questions of defendant's and plaintiff's negligence to the jury, within the issues made by the pleadings, to which no exceptions have been taken; and defendant has no just ground to complain of the conclusion reached in either regard. *Johnson v. Young*, 127 Minn. 462, 149 N. W. 940; *Kling v. Thompson-McDonald Lumber Co.* 127 Minn. 468, 149 N. W. 947.

2. Defendant assigns error because a witness, a business man of mature years, who saw the automobile as its rear end passed the gate-

<sup>1</sup> See Per Curiam order on page 452.

of the street car and until it stopped, was allowed, over his objection, to give an opinion as to how fast it was moving, though he had previously testified that he had never theretofore attempted to determine the speed of an automobile by watching it pass, and was unable to state positively how fast this one was going. The ruling was correct. Any person of reasonable intelligence and ordinary experience in life may, without proof of further qualification, express an opinion as to how fast an automobile or other moving object which has come under his observation was going at a particular time. *Wolfe v. Ives*, 83 Conn. 174, 179, 76 Atl. 526; 2 R. C. L. 1202; 19 Ann. Cas. 754, note.

3. The verdict was for \$6,000, which defendant claims is excessive. Plaintiff was an electrician, about 36 years old, earning from \$110 to \$130 a month. In addition to a wound eight inches long on his thigh, and other minor injuries, the main bone in his leg was fractured between the ankle and knee, and likewise the small one in two places; from which he made a poor recovery, several surgical operations having already been necessary, with the prospect, at the time of the trial, of the necessity of another, because of the presence of steel plates used in obtaining a union of the large bone and the failure of a sinus, or opening in the skin connecting with the bone, to heal. At that time, February 17, 1914, he was still suffering from inflammation of the shoulder joint, sprain in the back and hip, partial loss of ankle motion and power over the great toe, and flat-foot; being practically unable to work or move about without crutches or a crutch and cane. He incurred a hospital bill of \$70 and a physician's charge which the jury might have found in the sum of seven or eight hundred dollars. We sustain the verdict.

4. Before taxing costs plaintiff obtained, from a district judge other than the one who tried the case, an *ex parte* order, "subject to the usual objections upon taxation of costs," allowing him expert witness' fees for the physician who treated him and testified on the trial. This allowance was set out in plaintiff's notice of taxation of costs as a disbursement and allowed; and defendant, having taken no objection thereto, is now precluded from questioning it.

We find no merit in the assignments of error not discussed.

PER CURIAM.

For the reasons given in the foregoing opinion, prepared by the late Justice Philip E. Brown, in accordance with the conclusions reached by the court, the judgment appealed from is affirmed.

---

WILLIAM PIERCE COWLES v. CITY OF MINNEAPOLIS.<sup>1</sup>

February 19, 1915.

Nos. 19,005—(224).

**Contract—breach—finding sustained by evidence.**

The evidence has been examined and found sufficient to sustain the findings of the trial court.

Action in the district court for Hennepin county to recover \$1,-335.18, balance due upon a written contract for services. The case was tried before Hale, J., who made findings and ordered judgment in favor of plaintiff in the sum of \$1,155.12. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

*C. J. Rockwood*, for appellant.

*Arthur M. Higgins* and *Charles B. Elliott*, for respondent.

TAYLOR, C.

Defendant being about to construct four re-inforced concrete bridges over canals connecting the lakes in the western part of the city, entered into a contract with plaintiff, a civil engineer, whereby plaintiff agreed to make the detail drawings for the bridges, and, among other things, agreed to "inspect and supervise the materials and work during the course of construction, so as to secure the best results, mechanically and architecturally." Defendant let the contract for constructing the bridges to the Security Bridge Co., and provided in the contract that plaintiff should supervise the work,

<sup>1</sup> Reported in 151 N. W. 184.

and that all work and material should be satisfactory to him, and that his decision with reference thereto should be final. The contract provided that the abutments and wing walls for the bridges should rest upon piling driven until each pile would carry a load of 15 tons,—that fact to be determined according to an engineer's formula set forth in and made a part of the contract. After the bridges were finished, one wing wall at each end of the bridge last completed settled so that a crack appeared between this wall and the abutment to which it adjoined, and these two walls were taken down and rebuilt at a substantial additional expense. When these walls were taken down, it was discovered that the piles upon which they rested, instead of having been driven until each pile would sustain a load of 15 tons, had only been driven until they would sustain loads varying from seven to thirteen tons and no more. The defects in the wall resulted from the failure to comply with this requirement of the contract.

Defendant had paid plaintiff approximately four-fifths of the amount he was to receive for his services before discovering the defects in the work, but refused to pay the remainder thereof, on the ground that he had failed to supervise and inspect the work as required by his contract. He brought this suit to recover the balance unpaid, and alleged that he had fully performed his contract in all respects. Defendant alleged that he had failed to perform his contract, in that he had not secured the proper driving of the piles in question, and had not required the contractor to drive the full number of piles indicated upon the plan made a part of the contract with the bridge company. By agreement the cause was tried before the court without a jury. The court found that plaintiff had performed all the terms and conditions of his contract, and that the defects in question were not due to any "fault, negligence or omission" on his part, and rendered judgment in his favor for the amount claimed. Defendant appealed from the judgment, and presents the single question as to whether the evidence sustains the above finding.

Plaintiff was an engineer and was employed as such. In performing the work which he undertook, it was his duty to exercise such care, skill and diligence as men engaged in that profession or-

dinarily exercise under like circumstances. He was not an insurer that the contractors would perform their work properly in all respects; but it was his duty to exercise reasonable care to see that they did so. The work was progressing in different places at the same time. A large number of piles had been driven before those in question, and apparently had been properly driven. The latter part of the work was hurried to make ready for a civic celebration.

The printed record contains over 450 pages and we shall make no attempt to recapitulate the evidence. It shows that plaintiff did not know the manner in which the piles in question were driven, and failed to discover that they had not been driven as required by the specifications. Records of the driving of the piles had been kept by a city employee, until those in question were reached, but were not kept of those in question because other duties called this employee elsewhere. There is testimony to the effect that plaintiff inspected the various parts of the work two or three times a day; that he endeavored to have records kept of the driving of all the piles; that he was not present when those in question were driven; that he inquired of the men who drove them how they had been driven, and was assured that they had been driven to the extent required; that these men were of good repute and competent to determine such questions, and that their previous reports had been correct and reliable. By the contract between the city and the bridge company, the city agreed to pay the company the actual cost of doing the work, and, in addition thereto, 15 per cent of such cost as profit, with a provision that the entire expense should not exceed a stipulated sum. The city also furnished the piles. Under such a contract there was little motive to slight the work. The testimony of experts was to the effect that it was proper and customary for an engineer to rely upon such information as plaintiff relied upon. In view of all the facts and circumstances shown by the evidence, the question as to whether plaintiff was derelict in failing to discover that the piles had been improperly driven, was a question of fact for the trial court; and that court having found the fact in plaintiff's favor this court cannot interfere with such finding.

Plaintiff had prepared the original plans and specifications for the

bridge, but at defendant's instance had subsequently prepared some modified plans. Apparently the original plans as well as most of the modified plans indicated eight piles for each wing wall, but one of the modified plans indicated eleven piles for such walls. This particular modified plan was made a part of the contract with the bridge company. In answer to an inquiry by the contractor, plaintiff directed him to drive eight piles under each wing wall and only eight were driven. There is evidence to the effect that eight properly driven piles were sufficient; that only eight were intended to be used; that only eight were indicated on the plans in use upon the work; that, without instructions so to do, a draughtsman had marked three additional piles upon a plan prepared merely for use in explaining to the park board a proposed modification of the bridge itself for the purpose of lessening the expense, and that without plaintiff's knowledge this particular plan had been made a part of the contract with the bridge company, instead of the plan which he had prepared and supposed had been used for that purpose. In the light of the attending circumstances, plaintiff's failure to require the contractor to drive the three additional piles under these wing walls is not conclusive proof that he violated the duty which he owed to defendant.

Without adverting to many other facts bearing upon the questions presented, it is sufficient to say that an examination of the entire record leads to the conclusion that the evidence is sufficient to sustain the finding of the trial court, and that this court would not be justified in vacating such finding.

---

CHARLES V. McCOY v. CITY NATIONAL BANK OF  
DULUTH.<sup>1</sup>

February 19, 1915.

Nos. 19,014—(227).

**Bank — title to deposit.**

1. In a suit against the King Commission Co. (a corporation) — defendant

<sup>1</sup> Reported in 151 N. W. 178.

bank was garnished and disclosed an indebtedness to the commission company. Judgment was rendered against the bank upon its disclosures and the judgment was paid. Thereafter plaintiff brought this suit to recover the money from the bank, claiming that, although it had been deposited in the name of the King Commission Co., it in fact belonged to one A. A. King and that his title thereto had passed to plaintiff. *Held*, that there was no evidence sufficient to sustain a finding that the money did not belong to the corporation.

**Bank — admissions of officer.**

2. Statements of officers of the bank made in a casual conversation with plaintiff, or in an affidavit procured by plaintiff for his own purposes, are not admissions of the bank, nor evidence against the bank.

**Exclusion of testimony.**

3. The exclusion of testimony is not reversible error, unless it appear affirmatively that such testimony was relevant and material.

Action begun in the municipal court of the city of Duluth to recover \$59.41. The case was tried before Windom, J., who at the close of the testimony denied plaintiff's motion for a directed verdict and granted defendant's motion for a directed verdict. From an order denying plaintiff's motion for judgment notwithstanding the verdict or for a new trial, he appealed to the district court for that county, where the order of the municipal court was affirmed, Ensign, Cant and Hughes, JJ. From the order of the district court, plaintiff appealed. *Affirmed.*

*Charles V. McCoy and Thorwald Hansen, for appellant.*

*Benjamin M. Goldberg and Edmund Ingalls, for respondent.*

**TAYLOR, C.**

On September 7, 1911, one R. C. Hawkins brought suit against the King Commission Co. (a corporation), in the municipal court of the city of Duluth, and garnished the City National Bank. On September 23, the bank disclosed an indebtedness to the defendant, the King Commission Co., of \$59.41. Thereafter the main action was tried, and, on November 17, 1911, judgment was entered in favor of Hawkins and against the King Commission Co. (a corporation), for the sum of \$165.01, and against the garnishee, the City National

Bank, for the sum of \$59.41. The bank paid and satisfied the judgment against itself the same day it was rendered.

On October 16, 1911, Albert A. King, doing business as A. A. King Warehouse Co., filed a voluntary petition in bankruptcy and was adjudged a bankrupt. He did not list any claim against the bank, in his schedule of assets, but on October 26 procured an order from the United States court to show cause why Hawkins should not be restrained from prosecuting his action, and why the garnishment should not be vacated, on the ground that the suit was against him under the name of the King Commission Co., and that the bank deposit belonged to him. On November 7, the United States court denied his application and vacated the order to show cause. On November 18, 1911, the trustee in bankruptcy, claiming that the money paid by the bank to Hawkins belonged to the bankrupt estate, procured an order from the referee in bankruptcy requiring both Hawkins and the bank to show cause why they should not pay such money over to him as such trustee. After a hearing at which all parties were represented, the referee dismissed the application by an order which recites that judgment had been entered against the King Commission Co., a corporation, in favor of R. C. Hawkins; that the City National Bank, under garnishee process, had disclosed that it had the sum of \$59.41 belonging to the King Commission Co.; that the judge of the United States court had denied an application to vacate the garnishment; that judgment had been entered against the bank for the sum of \$59.41, and had been paid by the bank; that the King Commission Co. is a corporation; and that it nowhere appeared in the bankruptcy schedules that Albert A. King ever did business under the name of the King Commission Co.

In January, 1912, the trustee in bankruptcy sold to C. V. McCoy all the book accounts and claims of the bankrupt for the sum of \$20 and, for the purpose of this decision, we shall assume that, if King had any claim against the bank at the time he was adjudged a bankrupt, title thereto passed to McCoy. McCoy had been attorney for the King Commission Co. in the Hawkins suit, and for King in his bankruptcy matter, and in consequence was familiar with all the proceedings. Soon after purchasing the claims of the bankrupt,

McCoy brought the present suit in the municipal court of the city of Duluth to recover the above mentioned \$59.41 from the bank. The municipal court directed a verdict for defendant. McCoy made a motion for judgment notwithstanding the verdict or for a new trial. This motion was denied and he appealed to the district court which affirmed the order of the municipal court. A further appeal brings the cause before this court.

Unless the money in controversy belonged to King personally and not the corporation, plaintiff has no claim to it. In the Hawkins suit it was expressly found by the court that the defendant, the King Commission Co., was a corporation. In the present suit it is expressly admitted in the pleadings that there is a corporation of that name, and that the money in controversy was deposited in the bank in that name. To entitle him to recover, it was incumbent upon plaintiff to prove that the money belonged to King personally and not to the corporation. Plaintiff called the assistant cashier of the bank for cross-examination. He testified in substance that the King Commission Co. had an account with the bank, and had \$59.41 on deposit therein on October 16, 1911; that this account had been opened by King and some of the deposits had been made by him; that checks upon the account were signed: "King Commission Company by A. A. King;" that King was connected with the Commission Company but in what capacity the witness did not know; and that King individually had no deposit in the bank whatever. Plaintiff also called King as a witness and asked him this question: "At the time of your filing your petition in bankruptcy and prior to that time did you have money on deposit at the City National Bank of Duluth?" To which he answered: "I had." This is the only testimony given by King. All other questions asked him were ruled out, and as such rulings are not assigned as error they cannot be considered. The foregoing is all the evidence in the case to show that the money in controversy belonged to King and not to the corporation, and is wholly insufficient to sustain a verdict in favor of plaintiff. The only testimony tending to show that King had money in the bank was his own statement above quoted; and he failed to state any amount whatever,

or any facts tending to show that the money standing in the name of the commission company belonged to him. The statements of officers of the bank made in a casual conversation with plaintiff, or in an affidavit procured by plaintiff for his own purposes, were not admissions of the bank nor evidence against the bank. First State Bank of Storden v. Pederson, 123 Minn. 374, 143 N. W. 980; Berg v. Pittsburgh Construction Co. 128 Minn. 408, 150 N. W. 1092; Browning v. Hinkle, 48 Minn. 544, 51 N. W. 605, 31 Am. St. 691.

Plaintiff asked the assistant cashier whether, on October 16, 1911, he knew that the money in the bank to the credit of the King Commission Co. belonged to Albert A. King; and also asked him to state to whom it belonged, if he knew. Both questions were excluded and the rulings are assigned as error. The court might well have permitted these questions to have been answered, but, as the evidence stood, it was not reversible error to exclude them. There had been no evidence tending to show that the money belonged to any one other than the commission company. It appeared quite clearly that the witness had no knowledge of any facts tending to show that the money did not belong to the company. There was no evidence indicating, and no offer to show, that he knew of, or could testify to, any facts or circumstances tending to prove that it belonged to King. The exclusion of testimony is not reversible error, unless it appear affirmatively that such testimony was relevant and material. 3 Dunnell, Minn. Dig. § 9717. No such showing was made in the present case.

The other errors assigned all relate to evidence bearing upon the question as to whether King's claim against the bank had been transferred to plaintiff. We have assumed that the claim had been properly sold and assigned to plaintiff and the rulings complained of, whether right or wrong, could not have changed the result.

Order affirmed.

JOSEPH SCHAAR v. ROSS A. CONFORTH.<sup>1</sup>

February 19, 1915.

Nos. 19,021—(225).

**Statute — liability for violation — proximate cause.**

1. Where a statute is enacted for the protection of individuals, one who violates it is liable to those for whose protection it was intended for injuries proximately resulting from its violation; and the question of liability is a question of proximate cause.

**Motor vehicle — act of 1911.**

2. Applying this rule, it is *held* that under Laws 1911, c. 365, § 15 (G. S. 1913, § 2634), prohibiting the operator of a motor vehicle from passing a draft animal driven by a woman, child or aged person, at a greater speed than four miles an hour, one violating such statute is liable for the injuries proximately resulting to those for whose protection it was intended.

**Same — care to be exercised.**

3. The provision of Laws 1911, c. 365, §§ 13, 15 (G. S. 1913, §§ 2632, 2634), requiring the operator of a motor vehicle to bring his machine to a stop in certain instances is governed by the rule stated; and other provisions of said sections relative to the care to be exercised by the operator fix a standard of conduct the nonobservance of which is negligence.

**Same — stopping on signal.**

4. Under said sections requiring the operator of a motor vehicle to stop his machine when signalled by the driver of a rig which he is approaching, it is his duty to stop when the signal is given by an occupant of the rig though not the driver.

<sup>1</sup> Reported in 151 N. W. 275.

---

Note.—The question of the statutory duty of the operator of an automobile is treated in notes in 1 L.R.A.(N.S.) 223 and 4 L.R.A.(N.S.) 1130. And as to the duty of the operator of an automobile as to speed, see note in 38 L.R.A.(N.S.) 488.

Upon the duty of the operator of an automobile when horses are encountered on the highway, see notes in 1 L.R.A.(N.S.) 223, 224; 14 L.R.A.(N.S.) 251, and 48 L.R.A.(N.S.) 946.

**Act constitutional — speed limit.**

5. The statute fixing the limit of speed in passing at four miles an hour is not unconstitutional as class legislation.

**New trial.**

6. A new trial was rightly granted for error in submitting to the jury the question whether the tear duct of the injured child was destroyed, there being no evidence that it was.

Action in the district court for Wright county by the father of Gladys Schaar, a minor, to recover \$9,300 damages for injuries received by her. The case was tried before Giddings, J., and a jury which returned a verdict for \$2,500. From an order granting defendant's motion for a new trial, plaintiff appealed. Affirmed.

*F. H. Lindsley, M. A. Jordan and Latham & Pidgeon, for appellant.*

*W. H. Cutting, for respondent.*

**DIBELL, C.**

Action by plaintiff to recover damages for injuries sustained by his infant daughter some ten years of age. She was riding with three girl companions on a country road in a buggy, drawn by one horse, one of the girls driving. The defendant in his auto met and passed them. The horse ran away and the child was thrown out and injured. It is claimed that the defendant was in violation of a statute and was negligent and that his violation of the statute and negligence caused the injury. There was a verdict for the plaintiff. The court granted defendant's motion for a new trial and the plaintiff appeals.

A number of grounds for a new trial were assigned in the motion and they are proper to be urged in support of the order. One is determinative of the appeal; but in view of a new trial other questions presented by the record and argued by counsel are considered.

1. When the purpose of a statute is the protection of individuals one who violates it is liable to those for whose protection it was intended for injuries directly resulting from its violation. It is said that a violation of the statute is negligence *per se*; or that from its violation negligence is conclusively determined as a matter of law.

When there is such violation the question whether the acts of the one charged with liability, the statute aside, constitute negligence, is not debatable nor open to judicial inquiry. If the disobedience of the statute results in injury to one for whose protection it was passed, liability follows. The doctrine is illustrated by many cases: *Judson v. Great Northern Ry. Co.* 63 Minn. 248, 65 N. W. 447, where the engineer of a locomotive failed to give the statutory signal when approaching a railroad crossing; *Davidson v. Flour City Ornamental Iron Works*, 107 Minn. 17, 119 N. W. 483, 28 L.R.A.(N.S.) 332, 131 Am. St. 441, where there was a failure to guard machinery as required by statute; *Meshbesh v. Channellene Oil & Mnfg. Co.* 107 Minn. 104, 119 N. W. 428, where there was a sale in violation of the pure food statute; *Weyl v. Chicago, M. & St. P. Ry. Co.* 40 Minn. 350, 42 N. W. 24, where a train was run at a rate of speed forbidden by statute; *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 237, 53 Am. Rep. 47, where a team was left unhitched in the street, contrary to an ordinance, and ran away and injured the plaintiff, a traveler on the street; *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543, 12 Am. St. 698, where a druggist sold a poison without labeling it as the statute required. There are occasional expressions to the effect that the violation of a statute is evidence of negligence; but the settled law is that if the violation of the statute results in injury to one for whose protection it was enacted there is liability. The doctrine stated is limited by the rule as to contributory negligence and assumption of risks when such rule is applicable.

Without discussing the basis of the doctrine, which is not involved in our present inquiry, but to avoid a misunderstanding from what we have said, it may be noted that the violation of a statute or ordinance is not held in this state conclusive evidence of contributory negligence. Thus in *Day v. Duluth St. Ry. Co.* 121 Minn. 445, 141 N. W. 795, the fact that the driver of an auto, injured by a collision with a street car, was not at the time of his injury driving at the right of the intersection point in turning from a street into a cross street, as required by statute or ordinance, was held only a circumstance to be considered with all the evidence in the case as bearing upon his contributory negligence. In *Ericson v. Duluth*

& Iron Range R. Co. 57 Minn. 26, 58 N. W. 822, it was held that the owner of stock allowing it to run at large in violation of statute was not as a matter of law prevented from recovering from a railroad company for its killing. In *Oddie v. Mendenhall*, 84 Minn. 58, 86 N. W. 881, the leaving of a horse attached to a buggy unhitched in a street, in violation of an ordinance, was held not conclusively to establish contributory negligence preventing the plaintiff, who was in the buggy and injured by a collision with a street car, from recovering.

2. It is provided, in part, by Laws 1911, p. 499, c. 365, § 15 (G. S. 1913, § 2634), as follows:

"The operator of a motor vehicle, upon meeting or overtaking any horse, or other draft animal, driven or in charge of a woman, child or aged person, shall not pass said animal at a rate of speed greater than four miles per hour."

The defendant concedes that he passed the rig in which the plaintiff was riding at a speed in excess of four miles an hour—a speed which he admits to have been from seven to ten miles per hour. We are brought to a determination of the effect of the failure of the defendant to observe the command of the statute. The provision of the statute is drastic. The legislature intended that it be so. Existing conditions invited an effective remedy. We have no hesitation in holding that the driver of a motor vehicle violating this statute in the respect mentioned is liable for such injuries as proximately result because of the excessive speed.

From this holding it must not be understood that the statute is a license to the driver always to pass at the speed indicated. The situation may be such that he is liable for passing at a less speed or in attempting to pass at all. In such event his conduct, in the absence of an applicable statute, is measured by the common law.

3. The section quoted in the preceding paragraph contains this further provision:

"Provided, that in case said animal exhibits any signs of fright, the operator shall bring his machine to a stop, and, upon request or raising of the hand of the person in charge of said animal, or in case said animal continues to exhibit signs of fright, or in case the

person riding, driving or leading said animal cannot control the same, the said operator shall stop the motor of such vehicle, so long as shall be reasonably necessary to prevent damage to property, or life or limb of such person or animal."

By G. S. 1913, § 2632, it is provided, in part, as follows:

"A person operating or driving a motor vehicle, shall, on signal by raising the hand, or by request, from a person riding, leading or driving a horse, or horses, or other draft animals, bring such motor vehicle immediately to a stop, and, if traveling in the opposite direction, remain stationary so long as may be reasonable to allow such horse or animal to pass, \* \* \* provided that in case such horse or animal appears badly frightened, or the person operating such motor vehicle is so signalled or requested to do, such person shall cause the motor of such vehicle to cease running so long as shall be reasonably necessary to prevent accident and insure the safety of others."

The statutes quoted state a rule of conduct to be observed by the driver of an automobile. If the signal is given and the driver fails to observe the command of the statute that he stop, and injury comes because of it, liability results. In such case the principles stated in the preceding paragraph control. This particular question is substantially controlled by *Mahoney v. Maxfield*, 102 Minn. 377, 113 N. W. 904, 14 L.R.A.(N.S.) 251, 12 Ann. Cas. 289.

In stating the care which the driver must use the statute fixes the standard of conduct. A violation of it is negligence. The general obligation imposed is illustrated by similar provisions discussed in *Fairchild v. Fleming*, 125 Minn. 431, 147 N. W. 434; *Johnson v. Young*, 127 Minn. 462, 149 N. W. 940; *Kling v. Thompson-McDonald Lumber Co.* 127 Minn. 468, 149 N. W. 947; *Daly v. Curry*, *supra*, page 449, 151 N. W. 274. Whether signals were given was in dispute. The jury could have found either way. The defendant did not stop. The jury might have found that he did not exercise ordinary care in passing.

The court submitted the case to the jury along the general lines stated in this and the two preceding paragraphs and we see no substantial error.

4. The signals given the defendant were given by occupants of

the rig other than the driver by raising their hands. The statute must have a sensible construction. In our opinion it is not essential that the one holding the lines give the signal. It is enough if the signal is given by an occupant of the rig so that the auto driver is given fair warning that he should stop; and he should not be heard to quibble because the signal does not come from the driver. This is the holding in *State v. Goodwin*, 169 Ind. 265, 82 N. E. 459, decided under a similar statute. A precisely opposite conclusion was reached, under a similar statute, in *Messer v. Bruening*, 25 N. D. 599, 142 N. W. 158, 48 L.R.A.(N.S.) 945.

5. It is claimed that the statute prohibiting an auto passing a vehicle at more than four miles an hour is unconstitutional as class legislation. The statute is a police regulation. A statute confined to a class, if it applies generally to the class, and the classification is not based upon an arbitrary distinction, is not unconstitutional as class legislation. This statute is such a statute. *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 1 L.R.A.(N.S.) 215, 108 Am. St. 196, 3 Ann. Cas. 487.

6. The court submitted to the jury as an element of damage whether the tear duct of the child was destroyed. There was no evidence that it was. The submission of the question was error. Because of it a new trial was rightly granted.

Order affirmed.

---

## WILLIAM T. BLAKELY v. J. NEILS LUMBER COMPANY.<sup>1</sup>

February 19, 1915.

Nos. 19,028—(237).

### Former decision followed.

1. Former decision in this action (121 Minn. 280), followed and applied as the law of the case.

<sup>1</sup> Reported in 151 N. W. 182.  
128 M.—30.

**Submission of issues to jury — objection to directed verdict.**

2. Where there is an objection to an instructed verdict under section 7998, G. S. 1913, the objecting party is not required to request the submission of particular issues to the jury. Such requests may be made, but in the absence thereof the trial court will proceed and submit such issues as are presented by the pleadings and evidence, as the court deems proper.

**No error.**

3. The record presents no reversible error.

After the former appeals reported in 114 Minn. 523, 131 N. W. 1133, and 121 Minn. 280, 141 N. W. 179, the action was tried before Stanton, J., and a jury which returned a verdict of \$1,133.56 in favor of plaintiff. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Affirmed.

*Powell & Simpson, Leslie C. Millar and Ernest C. Carman, for appellant.*

*Chester McKusick, for respondent.*

**BROWN, C. J.**

This cause has been before us on two former appeals, 114 Minn. 523, 131 N. W. 1133; 121 Minn. 280, 141 N. W. 179. The facts were fully stated in the opinion on the second appeal, and the legal rights of the parties defined and stated, reference to which is here made for understanding of the case and the issues involved. The last trial resulted in a verdict for plaintiff, and defendant again appealed.

The former decision becomes the law of the case, controlling the rights and liabilities of the parties, and we have only to consider whether any errors were committed on the trial of a nature to justify a new trial. Our examination of the record brings to light no such error. Upon all controlling issues and questions in the case the trial court closely followed the decision of this court, and applied the rules there laid down as determinative of the rights and liabilities of the parties. The court instructed the jury that plaintiff could recover only upon a showing of a substantial performance of the contract; no question of waiver of performance was submitted to the jury, and

there is no sufficient foundation for the contention of defendant that there was a departure from the issues made by the pleadings. The instructions of the court upon the question of the amount of plaintiff's recovery, and the damages suffered by defendant in consequence of a failure of complete performance by plaintiff, were in strict accord with our former decision and therefore not open to the objections made by defendant.

At the conclusion of the trial defendant moved the court for a directed verdict in its favor, to which plaintiff interposed seasonable objection. The court thereupon submitted the issues to the jury by instructions covering the entire case. No special requests for the submission of any particular issue or issues were submitted to the court in connection with plaintiff's objection to a directed verdict, and defendant now contends that the court erred in submitting the issues in the manner stated. This contention is not well founded. The statute controlling situations of this kind (section 7998, G. S. 1913), cannot well be construed as claimed by counsel. The object and purpose of that statute was to abolish the practice of directing verdicts at the close of the trial. Where objection is made the court should proceed and submit the issues to the jury under the usual and appropriate instructions. Counsel may request the submission of particular issues, but they are not required to do so. When no special requests are made the usual method of concluding the trial should be observed and such instructions given as the court deems proper.

This covers all that need be said. We find no error in the admission or exclusion of evidence, or error in the charge of the court to justify a third trial of the action. The alleged misconduct of plaintiff's counsel was a matter for the trial court, in disposing of which we find no abuse of discretion.

Order affirmed.

**E. E. HANSON v. J. B. MARION.<sup>1</sup>**

February 19, 1915.

Nos. 19,029—(238).

**Statute of frauds — lease for more than one year.**

1. Cram v. Thompson, 87 Minn. 172, to the effect that a parol agreement to execute a lease of real property, the lease when executed to extend over a longer period than one year, is within the statute of frauds and unenforceable, followed and applied.

**Same — evidence of estoppel.**

2. The conclusion of the trial court that there was no evidence to justify an application of the doctrine of estoppel, and thereby to preclude defendant from invoking the statute, *held* sustained by the record.

**Motion to dismiss.**

3. Where it does not appear from the pleadings that the contract sued upon was in parol and within the statute of frauds, the statute may be taken advantage of by motion to dismiss at the close of plaintiff's case.

**Waiver.**

4. In such case the failure to object to the evidence when offered is not a waiver of the right to rely upon the statute.

**Statute of frauds — construction of section.**

5. The statute (section 6098, G. S. 1913) declares that no action can be maintained upon a contract therein referred to, unless in writing. It is *held* that the statute is not to be construed as prescribing a mere rule of evidence, but rather as precluding the substantive right of action upon the oral contract.

**Finding or verdict based on incompetent evidence.**

6. The rule that incompetent evidence received without objection is sufficient upon which to base a finding or verdict, applies only when such evidence establishes or tends to establish an enforceable right.

**Same.**

7. It has no application where the fact shown or proven by the incompetent evidence furnishes no basis for recovery or of a right of action: as an oral agreement within the statute of frauds which the statute declares unenforceable.

<sup>1</sup> Reported in 151 N. W. 195.

Action in the district court for Steele county to recover \$759 for breach of agreement to execute a written lease of certain farm land. The case was tried before Childress, J., and a jury which returned a verdict in favor of plaintiff for \$400. Defendant's motion for judgment in his favor notwithstanding the verdict was granted. From the order and the judgment entered pursuant to the order, plaintiff appealed. Affirmed.

*Charles Spillane and Moonan & Moonan, for appellant.*

*J. A. & A. W. Sawyer, for respondent.*

BROWN, C. J.

Defendant owns a dairy farm in Steele county, which at the time here in question was in the possession of tenants under a lease expiring in March, 1914. Defendant was on the lookout for a new tenant to take the place of those whose term was to expire at the time stated. In September, 1913, plaintiff, a resident of Iowa, came to Steele county, this state, and was by one Duncan, whom defendant had employed to find a tenant, presented to defendant as an applicant for a lease of the farm. Negotiations were had by the parties and the terms of the lease agreed upon. The proposed lease was upon the basis of cash rent, payable at stated times, and the term of the lease extended for a period of one year from March 1, 1914, with the privilege of an extension thereof for the further period of three years. The rent was to be secured by mortgage, but there is a dispute as to the property to be included therein. While all preliminary matters were fully agreed upon at the time stated no written evidence thereof was made or signed. Plaintiff declined to execute a lease until he had returned to his home and obtained the consent of his wife. Defendant made no objection to this, but stated to plaintiff that if the wife's consent or approval was obtained, and plaintiff should within a week remit to defendant the sum of \$50, on account of the rent to be paid, the contract would be put in writing and the lease prepared and signed upon plaintiff's return. Plaintiff's wife gave her assent, and within the time agreed upon plaintiff remitted to defendant the advance payment of \$50. Plaintiff owned some personal property, part of which, a threshing machine, he shipped to

Minnesota, driving a team of horses overland, and returned to Steele county on September 27, 1913, and announced to defendant his readiness to sign and execute the lease agreed upon. A dispute at once arose as to the character of security plaintiff was to give for the deferred rent. Defendant insisted that he was to have adequate security, that plaintiff's effects which he had moved from Iowa were wholly insufficient, and he declined and refused to proceed further in the matter. No contract was signed or executed, and possession of the farm was refused to plaintiff. Defendant may have assigned at the time of declining to execute the lease reasons other than the inadequacy of security (plaintiff so testified), but such was the reason asserted on the trial. In any event, and whatever may have been the reasons, the parties separated and no written lease was prepared or executed by either. Defendant tendered back the payment of \$50, which plaintiff refused to accept, and the same tender was again made on the trial of the action. Plaintiff brought this action to recover the damages alleged to have been suffered by reason of defendant's refusal to execute the lease, and the consequent breach of the verbal agreement to do so. The complaint alleged generally the making and entering into the agreement for the lease, and the damages suffered by defendant's refusal of performance. The answer was in effect a general denial. Plaintiff had a verdict. The court granted defendant's motion for judgment notwithstanding the verdict, and plaintiff appealed from the judgment entered in pursuance of such order. The theory on which the trial court granted the motion for judgment was that the agreement to enter into the contract of lease, not being in writing, was within the statute of frauds and unenforceable. In so deciding the trial court relied upon *Cram v. Thompson*, 87 Minn. 172, 91 N. W. 483.

The contentions of plaintiff are: (1) That the agreement to execute the lease, though the lease agreed upon extended for a period longer than one year, was independent of the lease itself, was to be performed by the execution of the lease within a year, namely, within a short time from the date of the agreement, and therefore was not within the statute of frauds; (2) that even though within the statute defendant is estopped by the facts presented from urging the statute

as a defense; and (3) that since all the evidence tending to prove the alleged contract was received without objection defendant waived the defense of the statute.

1. The first contention of plaintiff is disposed of by the case of *Cram v. Thompson*, supra. It was there expressly held that an oral contract to execute a lease, which when executed would extend for a period beyond one year, was within the statute and unenforceable. The question was squarely decided in that case and the decision must be deemed as settling the law on the subject in this state. There is no dispute in the case at bar that the lease when executed by the parties was to take effect in the future and for a longer period than one year. The agreement to enter into such lease is of no greater validity than an oral contract of lease, had one been entered into instead of the agreement to do so. If the oral agreement to enter into a lease which by the statutes (6998 and 7003, G. S. 1913) is required to be in writing, be held valid, then the purpose of the statute is wholly nullified, and may be avoided in all cases. The rule of the *Cram* case, which controls the question, seems in line with many of the authorities (4 Notes on Minn. Reports, 930; *Tiffany, L. & T.* 384; *Harrell v. Sonnabend*, 191 Mass. 310, 77 N. E. 764; *Hurley v. Woodsides*, 21 Ky. L. R. 1073, 54 S. W. 8; *Strehl v. D'Evers*, 66 Ill. 77; *Smith v. Phillips*, 69 N. H. 470, 43 Atl. 183; *Jordon v. Greensboro Furnace Co.* 126 N. C. 144, 35 S. E. 247, 78 Am. St. 644), though the courts are not in full harmony upon the question. *Shakespeare v. Alba*, 76 Ala. 351; *Tillman v. Fuller*, 13 Mich. 113; *Donovan v. Schoenhofen Brewing Co.* 92 Mo. App. 341. The distinction between the lease itself, and an agreement to execute the same is pointed out by Mr. Tiffany in his work on landlord and tenant. 1 *Tiffany, L. & T.* c. 6, p. 371. We, however, discover no sufficient reason for departing from the rule of the *Cram* case, and therefore follow and apply it as there laid down.

2. The second contention does not require discussion. A careful examination of the record discloses no evidence which would justify the conclusion that defendant by his conduct estopped himself from invoking the statute. There is no showing that defendant encouraged plaintiff to move his farming utensils to Minnesota before conclud-

ing the negotiations by the execution of the written lease, and no showing that defendant knew or had any reason to believe that plaintiff would incur any expense in that behalf. In fact plaintiff testified that nothing was said between the parties at the time of the preliminary negotiations about plaintiff's removal from Iowa, and for aught that appears from the record defendant had no reason to suppose that plaintiff would change his position until after the consummation of the agreement. The acceptance of the \$50, when remitted by check, is not sufficient to constitute an estoppel to challenge the validity of the oral agreement, since it was returned to plaintiff, at least tendered to him at the time of the disagreement and final abandonment of the negotiations, and again at the trial of the action. The facts do not bring the case within *Brown v. Hoag*, 35 Minn. 373, 29 N. W. 135, and other like cases cited by plaintiff.

3. Was there a waiver of the statute by the failure of defendant to object to the evidence on the trial of the action? We think the question must be answered in the negative. The complaint, as heretofore stated, alleged in general terms the agreement for a lease of the land, and contains no suggestion that it was not in writing. The answer was in substance a general denial and was sufficient to put plaintiff to the proof of a valid enforceable contract. The evidence presented disclosed that the contract relied upon was in parol, and it was all received without objection. But at the close of plaintiff's case defendant raised the question of the statute of frauds by a motion to dismiss the action, and again by a request for a directed verdict. There are authorities which sustain plaintiff's contention that defendant waived the statute by not reasonably objecting to the evidence. 20 Cyc. 320, and citations there made. But such is not the rule heretofore applied in this state. The practice generally understood with us as correct was stated by Mr. Justice Mitchell in *Iverson v. Cirkel*, 56 Minn. 299, 57 N. W. 800, as follows:

"The rule \* \* \* is that [defendant] may take advantage of the statute of frauds on the trial, either by objection to the competency of plaintiff's oral evidence when offered or by the objection, after its admission, that it does not prove a valid contract."

And the practice so announced has been followed in other cases.

Cram v. Thompson, *supra*; Brosius v. Evans, 90 Minn. 521, 97 N. W. 373; Tatge v. Tatge, 34 Minn. 272, 25 N. W. 596, 26 N. W. 121; Lally v. Crookston Lumber Co. 85 Minn. 257, 88 N. W. 846; O'Donnell v. Daily News Co. of Minneapolis, 119 Minn. 378, 138 N. W. 677. In these cases the bar of the statute did not appear from the pleadings, and the objection was entertained after the evidence had all been received. The rule applies whether the contract comes within sections 7002, 7003 or section 6998, G. S. 1913, and is void under the first, and unenforceable under the second of those sections of the statutes. In either case the statute may be invoked in the manner stated. The rule does not, however, necessarily apply where the complaint affirmatively alleges that the contract was not in writing, or the fact otherwise appears from the pleadings, or where the defendant by his answer admits the contract. Iverson v. Cirkel, *supra*. Where the character of the contract appears from the face of the complaint defendant must either demur thereto, or plead the statute in his answer, otherwise there is a waiver, and in such case the failure to object to the evidence would constitute a waiver of the objection that the contract was within the statute. 10 Standard Enc. Pr. 73 and 79, 3 Dunnell, Minn. Dig. § 8857. In the case at bar the pleadings squarely presented the issue whether a valid contract was entered into, and the question was properly raised.

4. Defendant invokes the general rule that incompetent evidence is sufficient proof of a fact when received without objection. Metropolitan Music Co. v. Shirley, 98 Minn. 292, 108 N. W. 271; Western Land Securities Co. v. Daniels-Jones Co. 113 Minn. 317, 129 N. W. 508. Rogers v. Stevenson, 16 Minn. 56 (68) is cited in support of the contention that the statute of frauds here involved (section 6998) merely prescribes a rule of evidence, and it is urged that since the evidence was received on the trial without objection it was sufficient to establish the contract in question. It may well be doubted whether the court intended in that case to so construe the statute. The language of the statute is that "no action shall be maintained" upon the contracts there referred to unless in writing, and though the statute may be waived by the party entitled to invoke it, it is clear that the legislature intended by its enactment something

more than a mere rule of evidence. If the statute declared that no evidence of such a contract was admissible unless in writing, the construction claimed for it would be well grounded. But it does not so read, and the construction of the statute heretofore has been that the contract is unenforceable, and not as a limitation of the mode of proof. Our decisions holding that incompetent evidence when received without objection is sufficient proof of a fact, do not therefore apply. The rule has application, for illustration, when parol evidence of the terms of a written contract is received without objection; where conversations with a person since deceased are received without objection; and in other instances when the fact thus proven establishes or tends to establish an actionable right. It clearly can have no application where the fact established by the incompetent evidence furnishes no basis for a recovery. In the case at bar the statute declares that no action shall be maintained upon an oral contract of the kind here in question, and this prohibition cannot well be brushed aside by a rule of the court based upon the method of proving the unenforceable contract.

Judgment affirmed.

---

STELLA THOMPSON v. BANKERS MUTUAL CASUALTY  
INSURANCE COMPANY.<sup>1</sup>

February 19, 1915.

Nos. 19,038—(253).

**Accident insurance — intoxication — burden of proof.**

1. This action is brought on an accident insurance policy to recover for death due to accidental injury. By the terms of the policy there can be no recovery if deceased was intoxicated at the time of injury. The bur-

<sup>1</sup> Reported in 151 N. W. 180.

---

Note.—On the question of presumption and burden of proof as to intoxication in action on accident insurance policy, see note in 15 L.R.A.(N.S.) 212.

den was on the defendant to prove intoxication. The evidence is conflicting and it is not conclusive that deceased was intoxicated.

**Evidence — opinion of expert — hearsay.**

2. Expert testimony of a physician based in part upon statements made to him by others may properly be received if the evidence shows what the reported statements were and there is evidence in the case tending to prove their truth.

**Evidence admissible.**

3. Any evidence tending to cast doubt upon defendant's theory of intoxication was proper, though not sufficient in itself to disprove it.

**Witness — impeachment — conviction of crime.**

4. Conviction of any crime, whether felony or petty misdemeanor, may be proved in order to impeach a witness. The nature of the crime may properly be shown.

Action in the district court for Mower county by a minor to recover \$1,500 upon defendant's accident insurance policy in favor of plaintiff's father. The answer set up several defenses, one that decedent was violating the law governing the driving of automobiles, another that his injuries were caused by his intoxication, a third that he was an intemperate person during the life of the policy. The case was tried before Quinn, J., who denied defendant's motion for dismissal of the action, and a jury which returned a verdict for \$1,649. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*Simon Michelet, Clyde R. White and Catherwood & NicholSEN, for appellant.*

*Sasse & French, for respondent.*

HALLAM, J.

On May 19, 1912, the body of Lee Thompson was found lying by the roadside under an overturned automobile which he had been driving. He held a policy of accident insurance issued by defendant in which plaintiff was named as beneficiary. Plaintiff brought suit on this policy and recovered a verdict. Defendant appeals.

1. The policy provided that defendant should not be liable for any accidental injuries received by deceased while intoxicated. De-

fendant claims that the evidence conclusively shows that deceased was intoxicated at the time of his death. The story of deceased's movements on the night of the accident, so far as they are known, are in general as follows: Deceased lived at Lansing, about six miles north of Austin. Late in the afternoon of May 18, he took his automobile and went to Austin on an errand, returning early in the evening. He then spent some time in the barn of one Fred Leek, at Lansing, and drank some liquor there. He then again went to Austin with a party of men, returning to Lansing about midnight, but passing straight through the town to the north. Nothing more was seen of him until three o'clock in the morning, when three farmers living four miles northeast of Lansing found deceased with his automobile stalled in the mud by the roadside, and they helped him out. The party then consisted of deceased, Leek, and one Herbert Hunt. They were then within one and one-half miles of Hunt's home but did not go there. Instead, they started to return to Austin. As they passed through Lansing, Leek left the car and went home. Hunt alone remained with deceased. As they came near Austin the road turns to the right. At this turn the car went over an embankment on the left side of the road, and deceased and Hunt were pinned beneath the car. Hunt was rescued alive, but deceased was dead when help came. The circumstances point strongly to a night of debauch. Deceased had been out most of the night. He was given to drinking to excess. So was Hunt. Hunt was admittedly intoxicated on this night. They had both beer and whisky in the automobile. On the other hand, there is the direct testimony of a large number of witnesses who saw deceased at several times during the night. The decided weight of this direct testimony is to the effect that deceased was in fact sober. The three farmers, who were the last witnesses to see him, gave unqualified testimony to this effect. Two juries have passed upon the case and each found that deceased was sober. The last verdict has the approval of the trial court. The burden of proving that the policy was avoided by the intoxication of deceased was upon the defendant. *Lockway v. Modern Woodmen of America*, 121 Minn. 170, 141 N. W. 1. It is clear

that the verdict is not clearly or palpably against the evidence, and we shall not disturb it.

2. Dr. Pierson, the coroner, was called as a witness for the plaintiff. He arrived at the scene of the accident soon after the automobile was removed from deceased. When he arrived, deceased was lying on the ground face downward and witness saw a mark across the back of his coat as if something had rested upon it. The witness stated that he ascertained the cause of death, and was permitted to testify that death was caused by suffocation due to the pressure of the heavy automobile upon his body. Objection is made that it appears from the doctor's testimony that his opinion is founded in part on what others told him as to conditions that existed before he arrived. Undoubtedly an expert witness should not be permitted to give an opinion without giving the facts upon which the opinion is based, and there should be competent evidence in the case tending to prove such facts. *Miller v. St. Paul City Ry. Co.* 62 Minn. 216, 64 N. W. 554; *Webb v. Minneapolis Street Ry. Co.* 107 Minn. 282, 119 N. W. 955. But we think it clear from all the evidence of Dr. Pierson that the hearsay report upon which he formed his opinion was the report that deceased when found was lying upon the ground with the automobile upon him, and that the mark which witness saw across his back was made by the pressure of the automobile seat. These facts were all in evidence and an opinion might properly be predicated upon them.

3. It is contended the court erred in permitting an automobile expert to testify that there was a "blow out" in the left front tire of the automobile, and that the effect of such a "blow out" would be to cause the car to move toward the side of the disabled tire. The purpose of the testimony was to account for the fact of the automobile going over the embankment. Defendant was contending the automobile went in a straight course over the bank without attempting to turn the corner, and urged that fact as ground for the belief that deceased was intoxicated. Plaintiff contended that deceased had started to turn his car around the corner and had made half the turn, and this fact and the additional fact of the "blow out"

which would carry the car in the direction of the bank were urged as accounting for the accident without necessity of resorting to defendant's theory of intoxication. In other words, the testimony as to the "blow out" had some tendency to meet and rebut defendant's theory of the case. The testimony was proper enough.

4. Plaintiff was permitted to show by way of cross-examination of one of defendant's witnesses that the witness had been convicted upon his own confession of the crime of assault, and to show the nature of the assault, that is, that it consisted in attempting to kiss a married woman. The admission of this evidence is assigned as error. The statute permits this form of impeaching testimony. It provides that "every person convicted of crime shall be a competent witness \* \* \* but his conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination." G. S. 1913, § 8504. The statute applies to all crimes. It bars none, whether felonies or petty misdemeanors, and whether the crime was or was not a crime at common law. In determining whether proof of conviction is admissible there is no room for inquiry as to whether or not the crime is one which affects the weight of the witness' testimony. *State v. Sauer*, 42 Minn. 258, 44 N. W. 115; *Harding v. Great Northern Ry. Co.* 77 Minn. 417, 80 N. W. 358. We do not doubt, however, that it was proper to show the character of the crime of which the witness was convicted. Evidence of conviction of any crime is admissible; nevertheless conviction of some crimes will reflect more on the credibility of a witness than would conviction of others. The nature of the offense may, therefore, properly be shown. See *State v. Adamson*, 43 Minn. 196, 200, 45 N. W. 152.

Some claim is made that deceased must have died of heart disease before the automobile capsized, and that death was accordingly not accidental. We find no evidence to require such a conclusion.

Order affirmed.

WILFRED PETRA v. CROOKSTON LUMBER COMPANY.<sup>1</sup>

February 19, 1915.

Nos. 19,044—(241).

**Assumption of risk.**

In this action to recover for personal injuries the evidence is considered and held to show conclusively that plaintiff assumed the risk.

Action in the district court for Cass county to recover \$2,999 for injuries received while in the employ of defendant. The case was tried before Stanton, J., and a jury which returned a verdict in favor of plaintiff for \$1,500. From an order denying defendant's motion for judgment notwithstanding the verdict or for a new trial, it appealed. Reversed with direction to enter judgment in favor of defendant.

*Powell & Simpson, Leslie C. Millar and Ernest C. Carman, for appellant.*

*Chester McKusick, for respondent.*

BUNN, J.

This is a personal injury case in which plaintiff recovered a verdict of \$1,500. Defendant appealed to this court from an order denying its motion in the alternative for judgment notwithstanding the verdict or for a new trial.

Defendant claims that there was no evidence of negligence, that plaintiff was guilty of contributory negligence, and that he assumed the risk.

The facts bearing upon these questions are practically undisputed, and are as follows: Defendant operates a sawmill on the south shore of Lake Bemidji. A spur track extends from the shore upon a trestle out into the lake. Cars loaded with logs are run out on this track, and the logs dumped into the water. Plaintiff was 49 years

<sup>1</sup> Reported in 151 N. W. 183.

of age, and had worked for defendant in unloading logs from cars on this trestle for several years. The cars used were flat cars provided with four upright stakes on each side. The stakes on one side of the car are set in stationary pockets, while on the other side they are set in patent pockets that trip by the operation of a lever on the stationary side, which allows the stakes to go out at the bottom, and a part of the load to roll from the car. About five o'clock in the afternoon of July 15, 1913, plaintiff and his "partner" tripped a car of logs on the trestle in the usual manner by working the lever on the stationary side. Only about one-fourth of the logs rolled from the car, the rest remaining. Plaintiff and his partner climbed up on the coupling apparatus of the car, one at each end, and examined the load in order to decide what to do in order to start it moving. They saw that the load was held by a "key log" near the center of the car, in the third tier of logs from the car floor, and decided that it was necessary to move or dislodge this key log. The load was made up of logs of different sizes and lengths. Resting on bunks on the bottom of the car were three or more tiers of short logs, from 10 to 16 feet in length; on top of these were several tiers of longer logs, some of them as long as the car and extending to the ends thereof. This made an overhanging shelf at each end of the car. Plaintiff crawled under this shelf and with his peavy attempted to dislodge the key log. Either through his own efforts or those of his partner at the other end, some of the logs on top rolled down, plaintiff was struck by one of them and sustained the injuries for which he seeks compensation in this action.

The claim of negligence relied on and on which this issue was submitted to the jury, was making up a load in the way this one was, putting short logs underneath, with longer ones on top. We will assume that this question was properly submitted to the jury.

We are of the opinion that the evidence conclusively showed that plaintiff assumed the risk. He knew just how the car was loaded. He knew that the logs might start to move at any moment, and deliberately placed himself in a position where it would require extreme agility to escape injury if either he or his partner succeeded in his efforts, or if the logs started from any cause. Not only did

plaintiff know the exact situation that constituted the danger, but that danger was apparent to and fully appreciated by him. His testimony is very frank, and is conclusive on this point. He was not ordered to crawl under the overhanging logs on this partly dumped load, and there was no need for him to take such a position. He freely admits that it was dangerous to do what he did, and that he was taking his chances, relying on getting away quickly should the load be started. We can see nothing else but a very clear case of assumption of risk, even if we could say that plaintiff was not guilty of the grossest negligence. See *Davison v. Ressler*, *supra*, page 204, 150 N. W. 802; *Johnson v. United Flour Mills Co.* *supra*, page 297, 150 N. W. 902.

The order appealed from is reversed with directions to enter judgment for defendant.

---

## STATE v. FRANCIS C. CARY.<sup>1</sup>

February 19, 1915.

Nos. 19,057—(14).

### **Grand larceny — evidence — variance.**

1. When an indictment alleges grand larceny in the first degree committed by obtaining "current and genuine money" by fraudulent representations, and the evidence shows that the one defrauded drew a draft on a Missouri bank in favor of a Minnesota bank, and the latter bank honored it and was ready to pay the money to the defendant and he requested two drafts and a deposit credit, there is no fatal variance.

### **Same — intent to defraud.**

2. The evidence is insufficient to sustain a conviction of obtaining money by false representations as to the ownership of property with intent to cheat and defraud.

Francis C. Cary, with others, was indicted by the grand jury, tried in the district court for Clay county before Parsons, J., and a

<sup>1</sup> Reported in 151 N. W. 186.

128 M.—31.

jury, and convicted of the crime of grand larceny in the first degree. From an order denying defendant's motion for a new trial, he appealed. Reversed.

*Leonard Eriksson*, for appellant.

*Lyndon A. Smith*, Attorney General, *John C. Nethaway*, Assistant Attorney General, and *Christian G. Dosland*, County Attorney, for respondent.

DIBELL, C.

The defendants Francis C. Cary, J. W. Bernardy and O. E. Linderson were indicted in Clay county for grand larceny in the first degree committed by obtaining money by fraudulent representations. Upon a separate trial of Cary he was convicted. He appeals from the order denying his motion for a new trial.

1. The charge in the indictment is that on January 20, 1914, the defendants falsely and fraudulently represented to the J. L. Price Brokerage Co., a corporation, of St. Joseph, Missouri, with intent to cheat and defraud it, that Bernardy was the owner of 13,000 bushels of potatoes in the warehouse at Barnesville; and that by such representations they induced him to purchase 8,250 bushels of potatoes for which he then paid \$5,512.50. The indictment alleges that the brokerage company, by reason of the false representations stated, paid to the defendants "the sum of \$5,512.50 lawful current and genuine money of the United States of America." No money was actually paid. What was done was this: The brokerage company, through J. L. Price, its principal officer, who was at the time at Barnesville, drew a draft in favor of the Citizens State Bank of Barnesville on the bank of Buchanan County, Missouri. The citizens bank, upon telegraphic authorization from the Missouri bank, honored the draft. Price and the defendant Cary went to the bank to get the proceeds. The cashier asked how they wanted the money. Cary requested one draft for \$4,000, another for \$1,000, and asked that the balance be deposited to the credit of the Minnesota & Dakota Potato Co. of which Bernardy was in control. The bank gave Minneapolis drafts, which were paid in due course, and made the credit as requested. It is clear that the money would have been

paid Cary by the bank. It was his choice that payment be made otherwise. It is now urged, and it was contended at the trial, that the proof varied from the indictment. There is no suggestion that the defendant was misled or prejudiced. To hold a fatal variance under these circumstances is but another application of a technicality, protecting no right of the accused, but tending to obstruct the administration of justice. We hold that there was not a fatal variance. The case of *People v. Dimick*, 107 N. Y. 13, 14 N. E. 178, gives some support to our holding.

2. In the fall of 1913 the brokerage company purchased of the Red River Potato Growers Association 8,250 bushels of potatoes for future delivery for the sum of \$7,012.50, advancing \$1,500 and leaving balance of \$5,512.50 to be paid. In January, 1914, trouble arose and Price, representing the brokerage company, came to Barnesville. He met Cary and Bernardy. His claim, sufficiently supported by the evidence, is that they represented to him that Bernardy owned something like 13,000 bushels of potatoes in the warehouse; and that if he would pay \$5,512.50 in cash, the amount which he was still owing for his potatoes, and would assign his claim of \$1,500 against the association, Bernardy would deliver to him 8,250 bushels of potatoes, the amount of his original purchase. Price took counsel with his attorney, Mr. Hanson of Barnesville, and the sale was made. Price paid the \$5,512.50 in the way indicated. Bernardy gave a bill of sale to the brokerage company, executed and delivered it a warehouse receipt, entered into a written contract in which he agreed to deliver the potatoes, and at the suggestion of Mr. Hanson, who was conversant with local conditions, and who feared that there might be trouble in making a delivery, executed a bond in the sum of \$7,000 with Cary's wife as surety, conditioned upon the performance of the contract and bill of sale. In February, 1914, in a suit instituted by the Potato Growers Association against the defendants, the nature of which the evidence does not disclose, a receiver was appointed. This receiver replevied the potatoes in the warehouse together with two carloads which Bernardy had loaded on the track destined for the brokerage company at St. Joseph. A little later a receiver in bankruptcy was appointed for the association

and the state receiver turned over to him the potatoes. Upon leave had from the Federal court the brokerage company sued the bankruptcy receiver and took possession of the potatoes. Bernardy furnished a bond in the sum of \$8,000 for this purpose, his father and Cary's wife being sureties. The brokerage company then obtained from the warehouse 7,800 bushels of potatoes. This was in March. What became of the two carloads that had been before loaded, aggregating 1,150 bushels, does not appear. Before the trouble commenced two carloads were shipped by Bernardy to Lincoln, Nebraska. They were not accepted and were reshipped to the Price Brokerage Co., at St. Joseph, for sale on commission. It sold them. The proceeds of one car amounted to \$301.02. The company sent this amount to Bernardy by check, but stopped its payment. The amount of the proceeds of the second car does not appear, but was apparently about the same as the other. The brokerage company retained the proceeds of both cars.

As a result of the transaction the brokerage company has received 7,800 bushels of potatoes without any deduction for shrinkage, instead of 8,250 bushels, and has received the proceeds of the sale of the two carloads first sent to Lincoln, amounting to 1,150 bushels. It has incurred some expense. Its title to the 7,800 bushels is in litigation. The contest over the title is with the receiver in bankruptcy of the Potato Growers Association; and the receiver necessarily depends upon the title of the association. There is no substantial evidence that the association had title to the potatoes. What the evidence in the replevin suit may show we do not anticipate.

There is much dispute as to the amount of potatoes in the warehouse at the time Price came to Barnesville in January. One Whinnack had 4,000 bushels in a separate bin. These were additional to the 13,000 bushels claimed. When the replevin suit was brought by the state receiver, the sheriff returned that he had taken 17,000 bushels. This was the state's evidence. The state showed that a number of farmers had deposited in the warehouse some 4,000 or 5,000 bushels during the fall or early winter of 1913. Bernardy had authority to sell a very considerable portion of these. It appears that there is a natural shrinkage of appreciable amount in stored potatoes. The

conditions in the warehouse were unfavorable and the shrinkage was great. Whitnack received practically nothing from his 4,000 bushels; and the testimony is that when Price was taking out his 7,800 bushels deterioration was rapid. There is much in the evidence to indicate that Bernardy, exclusive of the farmers' potatoes in storage, had as many as 8,250 bushels in January; and it is quite clear that of the farmers' potatoes he held several thousand bushels as bailee with authority of some kind to sell.

When the 7,800 bushels were shipped in March, Bernardy paid something like \$800 for labor, something like \$100 for sacks and for sorting, and paid the United States marshal \$100. He also paid the expenses of the litigation had to get possession of the potatoes, or undertook to do so.

There is evidence that the brokerage company sought a criminal indictment to force the defendants to pay considerable sums of money.

We have sketched in some detail the salient features of the evidence. We think it cannot be found beyond a reasonable doubt that Cary fraudulently represented the ownership of the potatoes with intent to deceive and cheat the brokerage company. What more could have been done by Cary or Bernardy to make a delivery we do not see. Every effort was put forth. The only reason that a delivery was not made was because of the claim of the Potato Growers Association. The farmers who had stored their potatoes in the warehouse made no claim. It does not seem a reasonable deduction from the evidence that there was an intent to defraud the brokerage company. It may be that Cary and Bernardy were engaged in fraudulent practices. We are given only a limited view of what transpired. There is much to suggest that they were getting the better of the farmers. There is little to suggest that they were intending to get the better of Price.

Order reversed.

STATE *ex rel.* GAYLORD FARMERS CO-OPERATIVE  
CREAMERY ASSOCIATION *v.* DISTRICT COURT  
OF SIBLEY COUNTY.<sup>1</sup>

February 19, 1915.

Nos. 19,170—(303).

**Workmen's Compensation Act—Income for dependent next of kin.**

1. The purpose of part 2 of the Workmen's Compensation Act was to secure the widow, or dependent next of kin, of an employee who should meet an accidental death while engaged in the line of his employment, a percentage income based upon their pecuniary loss, and the salary or compensation actually received by such employee at the time of his death represents such loss.

**Same—net income of servant.**

2. Where an employer pays to an employee having general charge of the affairs of the employer's business a fixed sum of money each month, from which the employee is required to pay an assistant, if one is employed by him to assist in the work, such sum as may be agreed upon between the employee and the assistant, the sum so paid the assistant forms no part of the salary or compensation of the employee, and in determining the salary of such employee the amount paid the assistant must be deducted from the total amount paid by the employer.

Upon the relation of the Gaylord Farmers Co-operative Creamery Association this court issued its writ of *certiorari* directed to the district court for Sibley county to review the proceedings of that court, Morrison, J., in the matter of the compensation demanded by his widow for the death of L. H. Kuhlman, wherein it was found that she was entitled to a sum equal to 35 per cent of decedent's monthly salary, that is, to monthly payments of \$38.50 for not exceeding 300 weeks. Remanded with directions.

*George A. & C. H. MacKenzie*, for relator.

*Rieke & Hamrum*, for respondent.

<sup>1</sup> Reported in 151 N. W. 182.

BROWN, C. J.

Relator is a corporation, organized under the laws of this state, and engaged in operating a creamery in Sibley county. For some years prior to his death L. H. Kuhlman was in the employ of the company in the capacity of general manager of its affairs, clothed with full authority in respect thereto. Kuhlman met an accidental death on June 13, 1914, while engaged in the line of his employment, and his widow brought proceedings to recover the compensation provided for by part 2 of the Workmen's Compensation Act. The trial court found the facts as here stated, and that at the time of his death Kuhlman was receiving the sum of \$110 per month, as wages for the services rendered by him, and judgment was ordered in favor of the widow on that basis, as provided for by the statute. Section 14, c. 467, p. 681, Laws 1913. Judgment was so entered and the company brought the cause to this court by *certiorari*, assigning as error the finding that Kuhlman was at the time of his death receiving a salary of \$110 per month. Whether this conclusion is sustained by the evidence is the only question presented.

There is no substantial dispute in the evidence, and the conclusion to be drawn therefrom is one of law. Decedent had been in the employ of the company for many years, and for a year or more prior to his death the company paid him monthly the sum of \$140, and he was receiving that amount at the time of his death. This was not wholly for his compensation. He was authorized by the company to employ an assistant to aid in the work, whose compensation was to come out of the monthly allowance to decedent. Decedent was not required to employ help, it was optional with him whether to do so or not, but, if employed, the company was under no obligation to pay his wages, except as the same was included in the monthly allowance to decedent. An assistant had been employed and he was engaged in the line of his work at the creamery at the time of the death of decedent, and was paid for his services at the rate of \$40 per month, but from the \$140 received by decedent from the company. This amount had been paid him for two or more months prior to the time in question, though previous thereto his salary had been \$30; his salary was raised to \$40 two months prior to the accident.

From these facts, which as before stated, are undisputed, we reach the conclusion that decedent's salary at the time of his death was \$100 per month, and not \$110 per month, as found by the trial court. In fact it would seem clear that decedent was receiving either \$140 or \$100 per month, and not an amount between those figures. It was the contention of the widow in the court below and by her counsel in this court, that the court should have found the salary to be \$140, because that sum was paid to decedent each month, and that it was of no concern to the company what decedent did with the money; that the employment of an assistant rested wholly with decedent, and his wages were paid from decedent's total income. We do not sustain this claim. The purpose of the compensation statute was to provide a percentage income to the widow, or dependent next of kin, based upon their pecuniary loss. Though decedent was paid this monthly sum of money, the purpose thereof was to defray the expense of operating the creamery and in view of the fact that the employment of an assistant was necessary, and that his compensation was to be paid therefrom. On the facts stated then, \$100 of this total amount belonged to decedent, and that amount only was devoted to the family support. This must, therefore, be treated as the pecuniary loss to the widow, and her percentage allowance should be based thereon.

The cause therefore is remanded to the court below with directions to modify its judgment to conform to the views herein expressed.

No statutory costs will be allowed to relator.

---

**P. O. HEIDE and Others v. PATRICK J. LYONS.<sup>1</sup>**

February 19, 1915.

No. 19,226.

**Grant of new trial — when order is appealable.**

Under Laws 1913, c. 474 (G. S. 1913, § 8001), an order granting a new

<sup>1</sup> Reported in 151 N. W. 139.

trial is not appealable unless it appears therefrom, or from the memorandum attached thereto, that it is granted exclusively on the ground of errors of law occurring at the trial; and when it appears that misconduct was one of the grounds the order is not appealable.

Action in the district court for Hennepin county. From an order granting plaintiffs' motion for a new trial, Leary, J., after verdict for defendant, defendant appealed. Motion to dismiss appeal granted.

*Booth & McDonald and Lancaster, Simpson & Purdy*, for appellant.

*Selover, Schultz & Selover*, for respondent.

PER CURIAM.

On motion to dismiss appeal.

The trial of the action resulted in a verdict for the defendant. Plaintiffs moved for a new trial. Their motion was granted. The defendant appeals from the order granting it. The plaintiffs move to dismiss the appeal upon the ground that the order is not appealable.

The statutory grounds for a new trial, abbreviating them, are these:

(1) Irregularity in the proceedings of the court, referee, jury or prevailing party.

(2) Misconduct of the jury or prevailing party.

(3) Accident or surprise.

(4) Newly discovered evidence.

(5) Excessive or insufficient damages.

(6) Errors of law occurring at the trial.

(7) Verdict not justified by the evidence or contrary to law.

R. L. 1905, § 4198 (G. S. 1913, § 7828).

Chapter 474, p. 699, Laws 1913 (G. S. 1913, § 8001), provides that "when an order granting a new trial is based exclusively upon errors occurring at the trial and it is so expressly stated in the order or memorandum of the trial court, an appeal therefrom may be taken, but in such case only."

The motion for a new trial was made on various grounds including misconduct of the defendant and his counsel and errors of law.

The order granting the new trial does not state that it was based

upon errors occurring at the trial. We gather from the memorandum that one ground on which the motion was granted was misconduct.

The provisions of Laws 1913 relative to appeals are plain. There is no call for construction. The effect of the statute is to abolish all appeals from orders granting new trials upon discretionary grounds. Unless the new trial is granted exclusively because of errors of law, and it is so stated in the order, or in the memorandum, the order is not appealable. If nothing is said as to the ground upon which the order is based, and the motion for a new trial is made on grounds additional to that of errors of law, it is not appealable. We do not mean that if the order shows the grounds upon which it is based, and they are in fact errors of law exclusively, it is not appealable because there is a failure to state within the words of the statute that the order is based "exclusively upon errors of law"; but it must appear that the new trial was granted exclusively because of errors of law. In the case before us it does not so appear, therefore the order is not appealable.

Appeal dismissed.

---

ANTON J. KLEMIK and Another v. HENRICKSEN  
JEWELRY COMPANY and Others.<sup>1</sup>

February 26, 1915.

Nos. 18,975—(199).

**Action on contract — pleading — motion to strike out.**

1. When one transaction or agreement constitutes an inducement or part consideration for another deal or contract, it is not objectionable in bringing suit upon the latter to plead the pertinent matters of the former. In this case the court committed no error in refusing to strike matters of inducement from the complaint or in refusing to compel an election.

**Ambiguity in contract — construction by conduct — question for jury.**

2. An ambiguous part in a written contract may, by subsequent acts of

<sup>1</sup> Reported in 151 N. W. 203.

the parties with reference thereto, be rendered certain. In such case, where the subsequent acts are in dispute, it is not improper to leave the interpretation of the ambiguous provision to the jury, although, as a general rule, the construction of a written contract is for the court.

**Statute of frauds — consideration.**

3. The contract sued on was not within the statute of frauds, requiring the consideration to be expressed therein.

**Charge to jury.**

4. No prejudicial error is found in the charge, or in the refusal to give certain requested instructions.

**Consideration of contract — parol evidence.**

5. The contract not being within the statute of frauds, it was permissible by oral testimony to prove that another contract constituted a consideration, although no reference is made thereto in either contract.

**Evidence — rulings of court.**

6. No reversible error is found in the rulings upon the reception or exclusion of evidence, nor in the alleged misconduct of respondent's counsel.

Action in the district court for Hennepin county to recover \$1,521.77 for failure to discharge plaintiff's debt. The case was tried before Dancer, J., who when plaintiff rested dismissed the action as to A. L. Henricksen, and a jury which returned a verdict in favor of plaintiffs for \$1,743.71. Defendants' motion for a new trial was denied, if plaintiffs consented to a reduction of the verdict by the sum of \$100.20. From an order denying their motion for a new trial, defendants appealed. Affirmed.

*R R. Briggs*, for appellants.

*Courtney & Courtney*, for respondents.

HOLT, J.

In April, 1910, the Henricksen Jewelry Co., a corporation, bought of plaintiffs a four-fifths interest in the retail jewelry business carried on by them, as partners, in Superior, Wisconsin. As part of the consideration the corporation was to pay, according to plaintiffs' contention, the existing debts of the partnership and the remainder of the purchase price was to be paid in cash or merchandise. Marius Henricksen and A. L. Henricksen were the officers and principal

stockholders of the corporation. A. L. Henricksen took an active part in the new partnership. Among the debts of the old firm was one to L. Gutman & Sons of \$1,521.72, secured by a real estate mortgage upon 160 acres of land in North Dakota owned by one of plaintiffs. This was not paid by the corporation and plaintiffs were sued by L. Gutman & Sons. The defense was apparently conducted by M. Henricksen and his attorney. Dissension soon appeared in the new partnership, and in November, 1910, plaintiffs sold their remaining interest to A. L. Henricksen. At the time plaintiffs claim the following instrument, Exhibit E, was executed:

"Nov. 23, 1910.

"M. Henricksen hereby agrees to settle and pay claim held by Gutman & Sons against Klemik Bros., \$1,521.72 + the expenses under power of attorney held by him. Said claim now pending settlement in court. A. J. Klemik to appear in defense of said claim without compensation or fees.

"M. Henricksen,

"Henricksen Jewelry Co.

(Seal)

"By A. L. Henricksen."

It may be stated that, a few days before the Henricksen Jewelry Co. bought the four-fifths of the business, plaintiffs gave M. Henricksen a power of attorney to settle and compromise with their creditors. L. Gutman & Sons, not being paid, foreclosed the mortgage mentioned; and this action was brought by plaintiffs for damages for the failure to pay the debt. The court dismissed the action as to A. L. Henricksen. The verdict was for plaintiffs, and the remaining defendants appeal from the order denying them a new trial.

Defendants, before answering, moved to strike out all matters in the complaint referring to the transaction in April, and the promise then made by the corporation to pay plaintiffs' existing indebtedness. The motion was denied, likewise a motion at the trial to require an election. Of this complaint is made. Passing the question whether the court's action in refusing to strike out parts of the pleading is reviewable on an appeal from the order denying a new trial, we think the complaint was not open to the attack made. It is obvious that the two transactions were, upon plaintiffs' theory, connected in that:

the unperformed agreement of the corporation to pay the debt to L. Gutman & Sons was an inducement and part consideration for the sale of the remaining interest and the making of the agreement of November 23, 1910. Such being the case, it was eminently proper to allege the matters fully. Nor was there an attempt to plead the facts in such a manner that a recovery might be had under either of two theories or causes of action. There was but one cause of action stated—the agreement of November 23, 1910—and hence no occasion to compel an election. Nor may the two defendants successfully urge a variance because the proof, as viewed by the trial court, failed to sustain the allegation of the complaint that the third defendant joined in the agreement. *Morgan v. Brach*, 104 Minn. 247, 116 N. W. 490.

The contract made in April when the corporation bought four-fifths interest in plaintiffs' firm was received in evidence. Because of an omission to insert the total of the firm's debts in a blank space, left for the purpose, the contract was, perhaps, ambiguous in one particular, namely, whether the corporation had the option of paying part or all of the purchase price by furnishing goods to the new partnership, or whether all the indebtedness of plaintiffs must first be paid. The court permitted the jury to arrive at the intention of the parties in this respect by considering the construction their subsequent conduct placed upon the provision. It is elementary that the parties to a contract containing a doubtful provision may render the same clear and certain by acts done with reference to the provision. 1 Dunnell, Minn. Dig. § 1820, and cases therein cited in note 56.

We are of the opinion that the April contract was properly admitted, for it had an important bearing upon the contentions of the parties, depending upon the interpretation the jury would find the proper one in the respect mentioned. It is obvious that if the jewelry company had the option to pay the entire purchase price for the four-fifths interest bought in April with merchandise, and had so done, no occasion existed for assuming any other obligation on November 23; and we would not expect plaintiffs to attempt to obtain more for their remaining one-fifth interest than it was worth.

On the contrary, if the corporation in November was in default upon their April contract, we may well appreciate that plaintiffs would insist that in the sale then made they should have a new and more effective contract from not only the corporation but from Martin Henricksen as well.

As a general rule the interpretation or construction of a written contract is for the court. The court however submitted to the jury the matter in contract, Exhibit E, and that was in reference to the meaning of the clause, "+ the expenses under power of attorney held by him." Conceding this to be error no prejudice resulted, for the court reduced the verdict by \$120, being the full amount of all expenses proven which might have been recovered under that clause.

As we look upon this case the real material fact in dispute was the delivery of Exhibit E, the agreement of November 23. If this contract was delivered and was legally binding the verdict is right. Defendants contend that it is an agreement to answer for the debt of another, and fails because no consideration is expressed therein. We think not. It was unquestionably exacted as part of the consideration for the sale of the one-fifth interest of the plaintiff in the business, and in part based upon the fact that the corporation had thus far failed to perform the prior agreement. The question of delivery was tersely and adequately submitted to the jury. Their finding cannot be disturbed.

Counsel for defendant lays great stress on the fact that the written agreement whereby plaintiffs sold their one-fifth interest to A. L. Henricksen provides for the payment of the full purchase price, permits plaintiffs to hold possession until it is paid, and makes no mention of the payment of the L. Gutman & Sons' claim. Therefore, it is said, Exhibit E cannot be a part of the transaction, the sale to A. L. Henricksen was no inducement or consideration for the agreement by M. Henricksen and the corporation to pay L. Gutman & Sons, and further that it is not permissible by oral testimony to connect the two. The contention is not sound. A written agreement not showing mutuality or consideration on its face may be supported by proof of another contract made at the same time, the making of the one being a consideration for the entering into the

other. *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 862. The proof may be oral, unless the contract comes within the statute of frauds. *Horn v. Hansen*, 56 Minn. 43, 57 N. W. 315, 22 L.R.A. 617. The real consideration for a written contract may, as a rule, be shown. 1 *Dunnell*, Minn. Dig. § 3373, note 87, cites the cases.

Insofar as defendants' requests to charge embodied correct statements of the law they were given or their substance incorporated in the general charge. The court need not use the exact words of a proffered instruction. As long as the same thought is conveyed in clear and apt language the form or choice of words is of no great importance.

We are not at all sure that the trial court rightfully eliminated from the verdict the mortgage foreclosure expenses for which plaintiffs became liable because of defendants' failure to pay the claim of L. Gutman & Sons, and therefore cannot perceive prejudice to defendants from the reception of the foreclosure decree in evidence.

Neither does the proposition appeal to us that defendants should have been allowed to show want of authority in A. L. Henricksen to deliver Exhibit E. If plaintiffs' version of the transaction was true both the Henricksens participated in the delivery, they were the principal officers and stockholders in the corporation, and they as well as the corporation derived benefits from the whole deal.

It is asserted that plaintiffs' counsel in addressing the jury by dramatic control of voice and pose gave such power and effect to the otherwise apparently harmless language employed that defendants were highly prejudiced. The trial court saw nothing in the episode likely to mislead the jury. Neither do we.

Order affirmed.

**MEDA H. LANSING v. FRANCES E. GREGORY.**

February 26, 1915.

Nos. 19,004—(228).

**Personal services — payment.**

The presumption is that services rendered by one member of a family to another are without expectation of pay and that there can be no recovery for them. This presumption is overcome by proof of a promise to pay, express or implied in fact. In this case, conceding that the respondent and decedent occupied the relation of members of a family, the evidence justified a finding of a contract to pay implied in fact.

In the matter of the estate of Cinderella M. Lansing, deceased, Meda H. Lansing filed a claim for \$1,120 for services rendered the decedent, and Frances E. Gregory, one of the next of kin of decedent, filed objections. From the order of the probate court for Hennepin county allowing claimant the sum of \$650, Frances E. Gregory appealed to the district court for that county where the appeal was heard by Leary, J., and a jury which returned a verdict in favor of claimant for \$1,347.48. Appellant's motion for judgment notwithstanding the verdict was denied, and that for a new trial was granted unless respondent consented to a reduction of the verdict to \$806.27. From the judgment entered pursuant to the order for judgment, Frances E. Gregory appealed. Affirmed.

*Lewis E. Stetler*, for appellant.

*George S. Grimes*, for respondent.

DIBELL, C.

On an appeal from the Hennepin county probate court to the dis-

<sup>1</sup> Reported in 151 N. W. 277.

---

Note.—As to the implication of agreement to pay for services rendered by relative or member of household, see note in 11 L.R.A.(N.S.) 873.

trict court the respondent, Meda H. Lansing, recovered a verdict against the estate of Cinderella M. Lansing for services as nurse.

Frances E. Gregory, one of the next of kin of decedent appeals from the judgment entered on the verdict.

That services as a nurse were rendered by the respondent to the decedent is without dispute; and there is no question but that they were of substantial value. They were quite out of the ordinary in character. Mrs. Lansing is the wife of the step-son of the deceased. They lived on terms of intimacy, and in the same house, if not as members of the same household. When services are rendered by one member of a family to another the presumption is that they are gratuitous; but this presumption is overcome by proof either of an express agreement to pay or of facts satisfactorily showing an intention on the part of both that there be compensation. *Beneke v. Beneke*, 119 Minn. 441, 138 N. W. 689, Ann. Cas. 1914B, 381, and cases cited. See notes, 133 Am. St. 248, 11 L.R.A.(N.S.) 873.

Whether the respondent and the deceased were members of the same household or family, within the rule, is left uncertain by the evidence. The question was put to the jury and the estate should not complain.

There is evidence that the deceased intended to pay for the services rendered by the respondent. There is evidence that the respondent did not intend that her services should be gratuitous. The evidence is such as to justify a finding of a contract implied in fact. Whether the jury found that the respondent and the deceased lived apart, or occupied the ordinary relation of members of the same family, the verdict is justified. As reduced by the trial court the amount awarded is within the amount properly recoverable.

Judgment affirmed.

128 M.—32.

**A. M. KIPP v. JAMES LOVE and Others.<sup>1</sup>**

February 26, 1915.

Nos. 19,011—(232).

**Indian land — location under power of attorney — title.**

1. Following *Nicholson v. Congdon*, 95 Minn. 188, and *Rogers v. Clark Iron Co.* 104 Minn. 198, it is held that the right and privilege given to certain persons under the Chippewa treaty of February 22, 1855,<sup>2</sup> to locate and enter 160 acres of land in the ceded territory was assignable, and that an irrevocable power of attorney, executed by the one entitled to this right for a valuable consideration, which released to the donee of the power all of the donor's beneficial interests to be derived from the exercise of such right, passed the legal title to the donee to land subsequently located, entered and patented thereunder, although, according to the prevailing practice of the United States land office, the entry was made and the patent issued in the name of the donor of the power.

**Finding sustained by evidence.**

2. The finding that the actual location and entry was made by the donee in the power of attorney, is sustained by the evidence, and the finding, that the prevailing practice of the United States land office required patents to issue in the name of the person given the right of entry by the treaty, although such right had been assigned, is considered not material, even if it should not be held that such practice prevailed to such an extent that courts are charged with judicial knowledge thereof.

**Amendment of answer — refusal to admit further testimony.**

3. The court committed no prejudicial error in permitting the answer to be amended after the evidence was submitted, for the evidence was admissible under the original answer. Nor did the court abuse its discretion in refusing to open the case and hear testimony upon the issues attempted to be raised by the reply to the amended answer, for no proper issue not already fully litigated and available to plaintiff was made by such reply.

**Taxation — notice of time to redeem — amount.**

4. A notice of the expiration of the time of redemption in a tax proceeding which is ambiguous and misleading as to the exact amount required to redeem is nugatory.

<sup>1</sup> Reported in 151 N. W. 201.

<sup>2</sup> 10 St. 1165.

**Lien for taxes.**

5. The record fails to disclose that plaintiff as holder of tax liens was entitled to a larger amount than awarded; and she has no cause for complaint that it was adjudged against defendant's lands as a whole instead of placing specific amounts thereof against each tract.

**Costs.**

6. The court did not err in awarding costs to defendant.

Action in the district court for Cass county to determine adverse claims to certain unoccupied land. The history of the case is given in the opinion. The case was tried as to defendant Ida C. Mulliken before McClenahan, J., who made findings and ordered judgment in favor of defendant, subject to the lien of plaintiff for the several amounts for which the parcels of land were sold with interest from the date of such sales. From the judgment in favor of defendant Mulliken entered pursuant to the order for judgment, plaintiff appealed. Affirmed, without prejudice to apply to the trial court for a modification in respect to the amount of plaintiff's lien.

*F. D. McMillen*, for appellant.

*Edwin C. Garrigues*, for respondent.

**HOLT, J.**

Plaintiff, claiming to be the owner of certain lands in Cass county, Minnesota, brought this action to determine adverse claims. The summons was served upon respondent by publication, and within a year she applied to have the judgment as to the lands here in controversy vacated and for leave to answer. The application was granted. In her answer she denied plaintiff's ownership, admitted that the premises were unoccupied, and alleged that she was owner; and, for a second defense and counterclaim, the answer alleged that under the treaty of February 22, 1855, between the United States and certain Indian tribes, the lands were entered and patented to Frank Duprey and Joseph La Bore, who sold and conveyed the same to William Mulliken; that Mulliken died, intestate, the owner of said lands; and that the defendant Ida C. Mulliken, the respondent, was

his sole heir. The reply, in addition to a denial, asserted ownership in plaintiff through tax proceedings, and also ownership to an undivided one-half of the land patented to La Bore through a deed from one of his heirs.

There were delays in the trial of the case; and, some time after the evidence was in, the court notified the attorneys by letter of his conclusions that, as the pleadings then stood, plaintiff was entitled to have findings made in her favor. Respondent thereupon moved and was granted leave to file an amended answer wherein she alleged that the entrymen mentioned for a valuable consideration sold, assigned and transferred to William Mulliken their right of location and entry and as evidence of the transfer executed and delivered to Mulliken instruments in writing on April 25, 1873, whereby Mulliken was constituted their attorney with power irrevocable to enter and take possession of the lands then owned or thereafter acquired by them under or by virtue of the right of entry under said Indian treaty; and, in consideration of \$250 paid to each by Mulliken, they released to him all claim to any proceeds of any sale, lease or contract relative to the lands; which instruments were recorded in the registry of deeds of Cass county March 20, 1874; that on March 10, 1874, Mulliken, acting under the power granted, duly entered at the United States land office the lands in controversy; that in the pursuance of the rulings of said land office the entries were made in the name of Frank Duprey and Joseph La Bore, the donors or grantors in the instruments mentioned, and the patents likewise, under the same ruling, issued in the names of such donors or grantors. The other allegations of the amended answer were the same as in the original. Plaintiff was permitted to reply. The reply alleged that Duprey and Joseph La Bore made the entries; that the court had decided in plaintiff's favor under date of February 26, 1912 (being the letter mentioned), that respondent by failing to assert title and neglecting to pay taxes had abandoned her right to the land; that Duprey's and Joseph La Bore's right of entry were personal and not assignable; and that plaintiff held valid tax titles to the property. The court refused plaintiff's application to open the case and receive testimony upon the new issues raised by this reply. Findings were made and

judgment ordered quieting title in respondent to the lands now claimed by her, and from the judgment so entered plaintiff appeals.

The decision of this appeal must rest upon the sufficiency of the so-called powers of attorney to vest the government title in William Mulliken. The patents are not in evidence, but we assume they issued pursuant to the entries. The locations, entries and final receiver's receipts from the United States land office clearly show that the lands were acquired under the provisions of the Indian treaty under consideration in *Nicholson v. Congdon*, 95 Minn. 188, 103 N. W. 1034, wherein it was held that the right of location and entry was assignable by the person entitled thereto. Under this treaty certain persons coming within its provisions were given the privilege to locate and enter 160 acres of land in the ceded territory at \$1.25 per acre. This privilege or right is not distinguishable from that of the soldiers' additional homestead right, which has been held assignable. *Webster v. Luther*, 163 U. S. 331, 16 Sup. Ct. 963, 41 L. ed. 179, affirming the judgment of this court in the same case in 50 Minn. 77, 52 N. W. 271; *Pardoe v. Merritt*, 75 Minn. 12, 77 N. W. 552. The powers of attorney executed by Frank Duprey and Joseph La Bore to William Mulliken are in all essentials so like the one considered in *Rogers v. Clark Iron Co.* 104 Minn. 198, 116 N. W. 739, that they must be given the same force and effect. The power in that case was held to pass to the donee the donor's whole title, legal and equitable, although the location and entry was made in the name of the donor and the patent issued to him. The subject is so exhaustively treated and the authorities sustaining the position so fully cited in the seventh, eighth, and ninth divisions of the opinion referred to, that nothing additional need be stated.

The court's finding that the actual location and entry was by Mulliken in the name of Duprey and La Bore in conformity to the prevailing practice of the United States land office, and that subsequently, according to such practice, patents issued in their names, is challenged. We think the entries on their face indicate that they were not made by Duprey and La Bore in person, and further, since they had transferred their right to enter the land and all right to the beneficial proceeds from the exercise of such right to Mulliken,

for a valuable consideration, by an irrevocable power of attorney, it is not to be assumed that they wrongfully attempted to exercise a right they no longer had. The practice of the United States land office, in the respect mentioned in the finding, has been so often referred to in both state and Federal decisions that it may, perhaps, be said to be so well known that the courts take judicial notice thereof. Be that as it may, the finding is hardly material in view of the decision of *Rogers v. Clark Iron Co.* *supra*.

The proper public records disclosed the transfer to Mulliken (by the irrevocable power of attorney) of La Bore's right of entry. Plaintiff is chargeable with notice thereof, and cannot invoke the protection of a good-faith purchaser of the undivided one-half interest she claimed to have acquired from one of La Bore's heirs. *Coursolle v. Weyerhauser*, 69 Minn. 328, 72 N. W. 697.

Our conclusion upon the merits of the respondent's claim of title necessarily determines that no prejudice resulted to plaintiff because of the order permitting an amendment of the answer. In fact, no amendment was necessary. The title was in respondent, and derived from Duprey and La Bore. Nor did the court err when denying plaintiff's motion to hear further evidence upon the claimed new issues tendered by the amended answer and the reply thereto. Aside from this being a discretionary matter, we do not think the amendments raised any material issues not already made, and upon which all the proof obtainable had been presented. The validity of plaintiff's tax titles, and the assignability of the right of location and entry under the Indian treaty, were questions of law already available to plaintiff and could not be bettered by additional proof. That respondent had abandoned her title to these vacant and unoccupied lands could not well be urged by plaintiff, until she first proved some title or estate therein. It may be noted that the last reply is as silent concerning taxes paid by plaintiff, or her assignor, as was the original.

It only remains to consider what rights plaintiff acquired through tax proceedings. Every tax proceeding upon which plaintiff bases title except one, discloses defects so clearly fatal under our decisions that no time need be spent referring to them. The one exception is a notice of the expiration of the time of redemption issued and

dated November 20, 1908, the following part of which reveals the ground upon which the learned trial court held it invalid, viz.:

"You are hereby notified that at a tax judgment sale held this 11th day of May, 1913, the following described parcels of land, situated in the county of Cass and the state of Minnesota, to-wit:

All in township 143, Range 25, Cass county, Minnesota.	Amount for which each parcel was bid in for the state of Minnesota.	Amount for which each parcel was sold to a purchaser, November 9th, 1908, which is also the amount required to redeem the same.
N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ Sec. 26	12.44 Dollars	18.38 Dollars
N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ Sec. 26	12.44 Dollars	18.38 Dollars
N. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ Sec. 27	24.59 Dollars	36.78 Dollars
Lots 6—7 Sec. 33	26.40 Dollars	39.04 Dollars

were each and all sold for the respective sums above specified.

"That the amount required to redeem each of said parcels, exclusive of the costs to accrue upon this notice, is the sums above stated, and interest as provided by law to the day such redemption is made."

It will be noticed that above the last column of figures is a statement that the figures give the amount which the purchaser paid the state on November 9, 1908, and also the amount required to redeem the same. No mention is there made of interest and costs. Nor was it a correct amount at the date of the notice. Further down the notice specifies that the amount required to redeem each of said parcels, exclusive of the costs to accrue upon this notice, is the sums above stated and interest. What is meant by *sums*? Two sums are given above for each parcel. Payment of both could not be exacted. So that, as to the amount required to redeem, we have first one sum specified as of November 9, 1908; then, if we ignore the subsequent plural of sums and read it sum, we obtain the sum previously specified plus costs and interest; and finally, if we take the notice as it reads, the redemptioner must pay for each parcel the two sums therein annexed to each description. We think the notice is so misleading and ambiguous that the owner's title was not cut off by the notice.

It is true that the court should have determined the amount of plaintiff's lien acquired through the tax certificates and payment of subsequent taxes. *Foster v. Clifford*, 110 Minn. 79, 124 N. W. 632. But plaintiff has no just ground for complaint. We have not had our attention called to any sums paid by plaintiff or her assignor for which liens could be claimed other than the sums allowed by the court in the supplemental findings. There was neither pleading nor proof of subsequent taxes paid by the holders of the tax titles or certificates. It is immaterial that the order for judgment omitted to direct a sale to satisfy the lien. The judgment, from which is the appeal, does provide for a sale. Plaintiff should not complain because the whole amount for which a lien was decreed was granted upon the premises as an entirety instead of apportioning it upon the several tracts.

Costs were properly awarded defendant under *Culligan v. Cosmopolitan Co.* 126 Minn. 218, 148 N. W. 273.

The judgment is affirmed.

### On Petition for Reargument.

On March 9, 1915, the following opinion was filed:

#### PER CURIAM.

Plaintiff claims that a lien should have been allowed for the amount paid upon two of the forties for governor's deeds issued on certificates based upon tax judgments held void. Neither by proper assignments of error nor by the printed brief was this matter presented for consideration in this court, and the inference from the record is, that the trial court's attention was not called thereto. But lest injustice be done plaintiff in that respect, the opinion herein is modified by adding thereto these words: Without prejudice to apply to the court below for a modification thereof in respect to the amount of plaintiff's lien.

JOHN KOMMERSTAD v. GREAT NORTHERN RAILWAY COMPANY.<sup>1</sup>

February 26, 1915.

Nos. 19,036—(248).

**Injury to servant — questions for jury — damages.**

The plaintiff, a section hand, working upon the defendant's right of way, was injured by a trespassing horse being struck by an engine and thrown against him. Upon a review of the evidence it is *held*:

(1) That it was a question for the jury whether the trainmen saw the horse on the track and negligently failed to give a warning or slacken speed.

(2) That it was a question for the jury whether the trainmen were negligent in failing to keep a proper lookout.

(3) That it was a question for the jury whether the negligence of the defendant, in either of the respects mentioned, was the proximate cause of the injury to the plaintiff.

(4) That the verdict, as reduced by the court, is not so excessive as to warrant interference by this court.

After the former appeal reported in 120 Minn. 376, 139 N. W. 713, the case was tried before Olsen, J., who denied defendant's motion to dismiss the action, and a jury which returned a verdict for \$5,000. Defendant's motion for judgment notwithstanding the verdict was denied, and its motion for a new trial was denied if plaintiff consented to a reduction of the verdict to \$3,500. From the order denying these motions, defendant appealed. Affirmed.

*James H. Hall, Aikens & Judge and M. L. Countryman*, for appellant.

*John I. Davis, Tom Davis and Ernest A. Michel*, for respondent.

**PER CURIAM.**

This is an action to recover damages for personal injuries alleged

<sup>1</sup> Reported in 151 N. W. 177.

to have been caused by defendant's negligence. Plaintiff had a verdict. Defendant appealed from an order denying its alternative motion.

The complaint was sustained as against a general demurrer upon a former appeal, the decision whereon is reported in 120 Minn. 376, 139 N. W. 713, and the facts which developed on the subsequent trial are as follows:

While plaintiff, a sectionman in defendant's employ, was, pursuant to his duties, engaged in cutting grass on its right of way, some two rods from the track at a point about one mile west of Benson, the engine of defendant's fast mail train, running westward at from 50 to 65 miles an hour, struck a trespassing horse on the track, throwing it about 195 feet against plaintiff, causing the injuries for which a recovery is sought. This happened at about noon on a bright, clear day, and no warning signals were given before the collision. Defendant's track from Benson to the place of the accident was level, and ran in a direct line on a graveled embankment about five or six feet high, with short grass on both sides. Two locomotive engineers were riding on the engine, one on the fireman's seat-box on the left side of the cab, and the other, in charge of the engine, on the engineer's seat at the right side. The latter testified that, though he was looking westerly from the time of leaving Benson, he did not see the horse until the locomotive struck it; the former, that he was keeping a lookout ahead, but first saw the animal when it was about 100 feet distant, at which time it was from 20 to 25 feet from the south side of the track, whereupon it immediately ran nearly straight across the track and was struck within five seconds from the time he first saw it. His testimony was to some extent corroborated by that of one of defendant's section foremen, who testified to the finding of horse tracks near where the horse was struck, indicating it had come out of the grass as stated. On the other hand one of plaintiff's witnesses testified that shortly after the accident he found horse tracks on the north side of the rail, for about 150 feet to the east of where the animal was struck;

and a witness for defendant, who was engaged in the same employment as plaintiff, and who was with him when the accident happened, testified to first seeing the horse when it came on the track from the south, whence it ran along the track towards the west some three or four hundred feet ahead of the engine.

1. Under the facts recited the jury might have found that the trainmen saw the horse on the track at such a time that by exercising reasonable diligence in the giving of a warning, or in slackening speed, the accident might have been avoided. The question of negligence in failing to give a warning or slacken speed was for the jury and it was properly submitted.

2. It was the duty of the trainmen to exercise ordinary care in keeping a lookout ahead of the train. They were bound to know that sectionmen were working on different portions of the road. It was a question for the jury whether they were negligent in respect of keeping a lookout; and it was properly submitted.

3. Whether the defendant's negligence, either in failing to give a warning after seeing the horse on the track, or in failing to keep a proper lookout, was the proximate cause of the injury, was for the jury. *Seewald v. Schmidt*, 127 Minn. 375, 149 N. W. 655, and cases cited.

4. It is claimed that the damages are excessive. The verdict was for \$5,000. It was reduced to \$3,500. It has the approval of the trial court. While from the record it seems that the injuries are uncertain and perhaps exaggerated, we are not prepared to say that the verdict should not stand.

Order affirmed.

**BIRDIE WINTERS v. AMERICAN RADIATOR COMPANY  
and Another.<sup>1</sup>**

February 26, 1915.

Nos. 19,050—(244).

**Injury to pedestrian — negligence of carrier — liability of shipper.**

The defendant radiator company employed a transfer company to make deliveries for it. The transfer company exercised an independent calling, routed the deliveries, took other deliveries with those of the defendant, received an agreed compensation per hundred weight, and the defendant exercised no control over it. A driver, in making a delivery, negligently left some radiators in the sidewalk space, and the plaintiff fell over them and was injured. It is *held* that the transfer company was an independent contractor and the defendant is not liable on the doctrine of *respondeat superior*.

Action in the district court for Ramsey county to recover \$5,500 for injuries received in falling over an obstruction upon the sidewalk. The case was tried before Catlin, J., who when plaintiff rested granted the motion of the American Radiator Co. to dismiss the action as to it and of his own motion extended the order to apply to defendant Cavanaugh Transfer & Storage Company. From an order denying her motion for a new trial, plaintiff appealed. Affirmed.

*H. A. Loughran*, for appellant.

*Lind, Ueland & Jerome*, for respondent radiator company.

DIBELL, C.

The plaintiff fell over some radiators left on the sidewalk space

<sup>1</sup> Reported in 151 N. W. 277.

---

Note.—As to the liability of the master for obstructions or defect in street caused by an independent contractor, see note in 20 L.R.A.(N.S.) 547.

On the question whether persons who furnish teams and men to do various kinds of work are independent contractors, see note in 65 L.R.A. 467.

and was injured. This action was brought against the defendant American Radiator Co. and another, for damages sustained through such fall. The case was dismissed as to the radiator company at the close of the testimony. The plaintiff appeals from the order denying her motion for a new trial.

The American Radiator Co. sold these radiators to one Stone, who as contractor was constructing a residence. It employed the Cavanaugh Transfer & Storage Co. to make delivery. The method of their doing business was this: When the radiator company wished material delivered by the transfer company it telephoned it, giving the place of delivery. The transfer company routed its deliveries so as to make an economical transfer; that is, it made out a number of deliveries which a particular wagon on a particular day could economically make and such wagon made the deliveries. The wagon took the radiators about nine o'clock in the morning. It made a number of other deliveries coming within its route—in all something like eight or nine. About half past eight in the evening it reached the premises at which the radiators were to be delivered. This was the last delivery but one for the day. The driver left the radiators on the sidewalk space in front of the lot adjoining the residence being constructed. In doing this he was negligent.

The question is whether the transfer company, in making the delivery, was a servant of the defendant for whose acts it is liable under the doctrine of *respondeat superior*, or an independent contractor for whose acts it is not liable. The defendant exercised no control over the transfer company in the doing of the work. It paid it an agreed compensation per hundred weight. It used this company and other companies. The transfer company exercised an independent calling. The arrangement between the radiator company and the transfer company was a common one. We are unable to hold that the doctrine of *respondeat superior* applies. The case is quite unlike *Waters v. Pioneer Fuel Co.* 52 Minn. 474, 55 N. W. 52, 38 Am. St. 564, where the teamster was hired with his team and was in control of the defendant and under its special direction. The transfer company was an independent contractor and the case comes fairly

within the following cases so holding: *Riedel v. Moran, Fitzsimons Co.* 103 Mich. 262, 61 N. W. 509 (plaintiff, a pedestrian, struck by barrel rolled out of defendant's warehouse on sidewalk by employee of cartage company under contract with defendant to do its carting); *Foster v. Wadsworth-Howland Co.* 168 Ill. 514, 48 N. E. 163 (death of child on street caused by negligence of driver of teaming company delivering for the defendant at an agreed sum per week); *Moore v. Stainton*, 80 App. Div. 295, 80 N. Y. Supp. 244, affirmed in 177 N. Y. 581, 69 N. E. 1127 (plaintiff injured while standing on street by being struck by a truck engaged in delivering merchandise of defendant); *Burns v. Michigan Paint Co.* 152 Mich. 613, 116 N. W. 182, 16 L.R.A.(N.S.) 816 (plaintiff, a pedestrian, injured by express wagon of a licensed expressman delivering merchandise for defendant); *DeForrest v. Wright*, 2 Mich. 368 (plaintiff, a pedestrian, injured by negligence of licensed drayman in unloading merchandise on sidewalk, he being employed by defendants to haul merchandise from warehouse and deliver to their store); *Chicago Hydraulic Press Brick Co. v. Campbell*, 116 Ill. App. 323 (injury through negligence of driver of teaming company hauling for defendant company which directed when to haul and where to make delivery); *Wood v. Cobb*, 13 Allen, 58 (plaintiff struck and injured by wagon of one who had contracted to do all the delivering for the defendant); *Fink v. Missouri Furnace Co.* 82 Mo. 276, 52 Am. Rep. 376 (child killed by negligence of one who dug and hauled sand from defendant's land to its furnace at a specified compensation per load); *Catlin v. T. B. Peddie & Co.* 46 App. Div. 596, 62 N. Y. Supp. 76 (plaintiff injured by negligence of employee of truckman engaged in making a delivery for defendant).

Order affirmed.

ERNEST L. HOPKINS v. GEORGE S. TAYLOR.<sup>1</sup>

February 26, 1915.

Nos. 19,055—(261).

**Surface water — duty of landowner.**

1. A landowner may rid his land, for any legitimate purpose, of surface waters, even to the injury of the land of another, but in doing so he must use all reasonable means to avoid unnecessary injury to the land of others. If it be practicable to deliver the water drained into a natural drain or watercourse, it is the duty of the landowner to do so, but circumstances may justify him in cutting through a watershed or in draining a marsh or pond that has no natural outlet.

**Finding — evidence — injunction.**

2. The evidence in this case sustains the findings of the trial court that the route taken by defendant in draining a marsh with no natural outlet was the most natural and feasible one, and that defendant used all reasonable means in constructing his drain so as not unnecessarily to injure plaintiff's land, and plaintiff's prayer for an injunction restraining the improvement was properly denied.

Action in the district court for Washington county to enjoin defendant from draining his swamps or wet lands by tiles, open drains or otherwise in such manner as to bring down onto the land of plaintiff any water that would otherwise be gathered and held in the swamps and low places on defendant's land. The case was tried before Stolberg, J., who made findings and dismissed the action on its merits. From an order denying his motion for a new trial, plaintiff appealed. Affirmed.

*J. N. Searles*, for appellant.

*W. B. Taylor*, for respondent.

HALLAM, J.

Plaintiff and defendant own adjoining forties of land. Defend-

<sup>1</sup> Reported in 151 N. W. 194.

---

Note.—The authorities on the question of the right to collect or divert water in masses are gathered in a note in 21 L.R.A. 595.

ant's land lies to the north of plaintiff's. On the westerly side of defendant's land is a marsh of about 4.5 acres with no natural drainage. Defendant undertook to drain this marsh by a system of tile drainage, running southeasterly into a somewhat larger marsh, which extends on both sides of the line between the land of plaintiff and defendant. The result was to throw into this marsh and upon the land of plaintiff somewhat more surface water than naturally flowed there, and plaintiff brought this action to enjoin defendant from installing this system of drainage. The court denied the injunction.

The law of the case is well settled. "The old common-law rule that surface water is a common enemy, which each owner may get rid of as best he can, is in force in this state, except that it is modified by the rule that he must so use his own as not unnecessarily or unreasonably to injure his neighbor." *Sheehan v. Flynn*, 59 Minn. 436, 61 N. W. 462, 26 L.R.A. 632, following *O'Brien v. City of St. Paul*, 25 Minn. 331, 335, 33 Am. Rep. 470. To the end that land shall be made productive, "a landowner may rid his land, for any legitimate purpose, of surface waters, even to the injury of the land of another; but in doing so he must use all reasonable means to avoid unnecessary injury to the land of others—that is, he cannot, in draining his own land, cause unreasonable or unnecessary injury to the land below. What is reasonable in such cases depends upon the special facts of each particular case." *Rieck v. Schamanski*, 117 Minn. 25, 32, 134 N. W. 228. If it be practicable to deliver the water drained, into a natural drain or watercourse, it is the duty of the landowner to do so. *Peterson v. Lundquist*, 106 Minn. 339, 342, 119 N. W. 50, but it is not indispensable that the artificial drainage be along the natural course of drainage. Circumstances may warrant the landowner in cutting through a watershed, or in draining a marsh or pond that has no natural outlet or course of drainage. Whether the course pursued follows the natural course of drainage is an important factor in determining the question of reasonable use, but it is not controlling. *Howard v. Illinois Central R. Co.* 114 Minn. 189, 130 N. W. 946; *Rieck v. Schamanski*, 117 Minn. 25, 134 N. W. 228. Any failure to observe the duty of reasonable care in such matters is negligence and renders the land-

owner liable. *Howard v. Illinois Central R. Co.* 114 Minn. 189, 193, 130 N. W. 946. The right of drainage of surface water may on occasions work some hardship upon the lower proprietor, but it has been recognized in this state for many years and it has furnished a practicable, and on the whole an equitable, working rule for the reclamation and improvement of the large areas of wet land with which the state abounds.

Coming now to the facts of this case. The trial court found in substance that the marsh drained had no natural outlet except in time of high water; that it then flowed in the direction followed by the tile drain constructed by defendant and onto plaintiff's land; that the most natural course of drainage is in that direction; and that the tile drain is constructed over the most feasible route, and the only route; and that defendant has used all reasonable means in constructing said drain so as not to unnecessarily injure plaintiff's land. There is little question that if the foregoing findings of fact are sustained by the evidence the trial court was right in denying plaintiff an injunction.

In the main the findings are sustained. It is conceded that, while if the water in defendant's marsh were high enough it would naturally flow southeasterly in the direction of plaintiff's land, yet in fact the water does not rise to such height that the marsh overflows, and to that extent the finding is not sustained. It is also conceded that drainage in a westerly direction by a system of tile or ditches constructed wholly on the land of another proprietor would be possible by making a deep enough cut, and accordingly the court was wrong in holding that the route chosen by defendant was the "only route."

But these portions of the findings are not of vital importance. The essential facts found are, that the route taken is the most natural and feasible route for the drainage of this marsh, and that defendant used all reasonable means in constructing said drain to drain his land so as not unnecessarily to injure plaintiff's land. The evidence amply sustains these findings of fact, and the trial court properly denied plaintiff an injunction.

Order affirmed.

128 M.—33.

**NORTHWESTERN MARBLE & TILE COMPANY v. JOSEPH WILLIAMS.<sup>1</sup>**

March 5, 1915.

Nos. 19,013—(157).

**Appeal and error—motion for judgment notwithstanding verdict.**

1. If, after verdict, the unsuccessful party moves for judgment notwithstanding the verdict, but does not move in the alternative for a new trial, he cannot on appeal be awarded a new trial. By resting solely upon his motion for judgment he waives all errors which would be ground only for a new trial.

**Carrier—defective packing—burden of proof.**

2. A common carrier is, at common law, an insurer of the goods shipped, and is responsible for all losses, except those arising from certain excepted causes. One excepted cause is improper packing by the shipper. The rules applicable to contributory negligence do not apply to such a case. The carrier must, to relieve himself from liability, show that the fault of the shipper was the sole cause of the loss.

**Carrier—when defective packing is evident.**

3. If improper packing is apparent to the carrier or his servants, then the carrier may refuse to receive the shipment. If he does receive the shipment he assumes to carry the goods as they are, and the full common law liability as carrier attaches.

**Same—when defective packing is not evident.**

4. Although the carrier has knowledge of the defective packing, yet if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing. On this point the evidence in this case presents a question for the jury.

Action transferred to the district court for Rice county to recover \$168 for alleged negligence in hauling and delivering certain

<sup>1</sup> Reported in 151 N. W. 419.

---

Note.—On the question of the liability of the carrier in respect of property which it accepts improperly packed or crated, see note in 29 L.R.A. (N.S.) 1214.

marble slabs. The case was tried before Childress, J., and a jury which returned a verdict in favor of defendant. From an order denying its motion for judgment notwithstanding the verdict, plaintiff appealed. Affirmed.

*Walter W. Todd*, for appellant.

*James P. McMahon*, for respondent.

HALLAM, J.

Plaintiff, a dealer in marble in Minneapolis, shipped a number of marble slabs by rail to the state school for the feeble minded at Faribault. Defendant is in the transfer business at Faribault. He was engaged to haul the marble from the railway station at Faribault to its destination. The marble was packed in crates, and on the way some of the crates fell from the wagon and several slabs were broken. Plaintiff sued for damages. The jury found for defendant. Plaintiff moved for judgment notwithstanding the verdict, but did not ask for a new trial, and the court denied the motion. This appeal involves only the question of the correctness of this ruling.

1. Plaintiff assigns as error certain rulings of the court in the admission of evidence and in the charge to the jury. If plaintiff were asking for a new trial it would be proper to consider these assignments of error, but they are quite immaterial on this appeal. A party against whom a verdict has been returned may move in the alternative for a new trial or for judgment notwithstanding the verdict. G. S. 1913, § 7998. When he moves only for judgment and rests upon that motion alone he cannot on appeal be awarded a new trial. He has waived all errors which would be ground only for a new trial. *Bragg v. Chicago, M. & St. P. Ry. Co.* 81 Minn. 130, 83 N. W. 511; *Krumdick v. Chicago & N. W. Ry. Co.* 90 Minn. 260, 95 N. W. 1122; *Sallden v. City of Little Falls*, 102 Minn. 358, 113 N. W. 884, 13 L.R.A.(N.S.) 790, 120 Am. St. 635; *Helmer v. Shevlin-Mathieu Lumber Co.* 129 Minn. 25, 151 N. W. 421. Errors in the admission of evidence or in the charge to the jury are of this sort. They present no ground for judgment notwithstanding the verdict. Final judgment cannot be given to the defeated

party because the cause was erroneously tried. Such party may, if he asks for it, be entitled to a new trial on this ground, but never to final judgment. The question before us is, not whether the case was properly tried, but whether there is any competent evidence reasonably tending to sustain the verdict. If so, the verdict must be sustained. In determining that question, every intendment will be indulged in favor of the verdict, and judgment will only be granted when the evidence is conclusive against the verdict. *Cruikshank v. St. Paul F. & M. Ins. Co.* 75 Minn. 266, 77 N. W. 958; *Fohl v. Chicago & N. W. Ry. Co.* 84 Minn. 314, 87 N. W. 919; *Marengo v. Great Northern Ry. Co.* 84 Minn. 397, 87 N. W. 1117; *Fischer v. Sperl*, 94 Minn. 421, 103 N. W. 502; *Stebbins v. Martin*, 121 Minn. 154, 140 N. W. 1029.

2. We address ourselves, therefore, to this question of the sufficiency of the evidence to sustain the verdict. Defendant was admittedly a common carrier of goods. A common carrier of goods in general insures the safe transportation of goods committed to him for that purpose, and he is responsible for all damage to the same while in transit, unless such damage is occasioned by certain excepted causes. These excepted causes are act of God, act of public enemy, the inherent quality or "proper vice" of the articles themselves, or some act or omission of the shipper or owner. *Christenson v. American Express Co.* 15 Minn. 208 (270); *Goodman v. Oregon R. & N. Co.* 22 Ore. 14, 28 Pac. 894.

Defendant contends that this case comes within the last exception, that is, the contention is that the marble slabs were not properly packed or crated by the shipper; that when they were transferred to wagons they were loaded in the proper and practicable way and were braced in the usual and proper way by means of boards running from the top of the crates to the bottom of the wagon bed; but that they fell by reason of the fact that the crating was worm eaten, dozy and decayed so that it would not properly hold the nails driven into it for that purpose.

The general rule is that, where the shipper packs articles for shipment, he cannot recover from the carrier for injuries due to improper packing. *Hutchinson, Carriers*, § 233; *Shriver v. Sioux*

City & St. P. R. Co. 24 Minn. 506, 31 Am. Rep. 353. Some authorities apply here the rules of contributory negligence, and hold that if the bad packing contributes in any measure to the loss or injury the carrier is not liable. 5 Thompson, Negligence, § 6465; see Reed v. Philadelphia W. & B. R. Co. 3 Houst. (Del.) 176, 212; Ross v. Troy & B. R. Co. 49 Vt. 364, 24 Am. Rep. 144. It appears to us that the rules of contributory negligence have no application to such a case. Contributory negligence of plaintiff is a defense only in cases where the action is founded on negligence of defendant. Here the action is not founded on negligence of the carrier at all. The carrier's common law liability is founded not on negligence but "on broad principles of public policy and convenience, and was introduced to prevent the necessity of going into circumstances impossible to be unravelled." Arthur v. St. Paul & D. R. Co. 38 Minn. 95, 100, 35 N. W. 718. It would be a distinct extension of the doctrine of contributory negligence to apply it to a case of this kind, and an extension which we believe to be unwarranted. On proof of the contract of carriage and of loss or damage, liability is *prima facie* established. To relieve himself from liability, the carrier must prove that the loss or damage arose solely from one or more of the excepted causes, and it avails him not to show that the shipper was negligent, if the loss or damage would not have resulted except for the concurring fault of the carrier. The proof must bring the case "entirely and perfectly within the exception." This view is sustained by the weight of authority. McCarthy & Baldwin v. Louisville & N. R. Co. 102 Ala. 193, 14 South. 370, 48 Am. St. 29; Hutchinson, Carriers, § 333; 1 Moore, Carriers, 559; 4 Elliott, Railroads, § 1492.

3. It is admitted that defendant discovered that the condition of the crating was defective at the time the marble was loaded on his wagon. It is claimed he thereby assumed all the responsibility of carrying it in its defective condition. There is some authority for the proposition that the full duty of the carrier is simply to carry goods in the condition offered, though the defect in loading or packing is apparent, and that if in such case injury results from such defective loading or packing the carrier is relieved. Ross v. Troy & B.

R. Co. 49 Vt. 364, 24 Am. Rep. 144; see *Union Express Co. v. Graham*, 26 Oh. St. 595. The better and the more general rule seems to be that, if goods presented for carriage are not properly packed, and that fact is apparent to the carrier or his servants upon ordinary observation, then the carrier may refuse to receive the goods in that condition; but, if he does see fit to receive them, he assumes to carry them as they are and his full common-law liability as carrier attaches to the contract of carriage. *McCarthy & Baldwin v. Louisville & N. R. Co.* 102 Ala. 193, 14 South. 370, 48 Am. St. 29; *Elgin, J. & E. Ry. Co. v. Bates Mach. Co.* 98 Ill. App. 311; *Elgin, J. & E. Ry. Co. v. Bates Mach. Co.* 200 Ill. 636, 66 N. E. 326, 93 Am. St. 218; *The David and Caroline*, 5 Blatch. (U. S.) 266; *Klauber v. American Express Co.* 21 Wis. 21, 91 Am. Dec. 452; *Atlantic Coast Line R. Co. v. Rice*, 169 Ala. 265, 52 South. 918, 29 L.R.A.(N.S.) 1214, Ann. Cas. 1912B, 389; *Hannibal R. R. v. Swift*, 12 Wall. (U. S.) 262, 20 L. ed. 423, 1 Moore, Carriers, 559.

4. It cannot be said, however, that the carrier must, at his peril, know that the goods are not in fact safely packed. The shipper usually knows better than the carrier the manner in which the goods have been packed and the manner in which they should be packed, and even though the carrier may have knowledge of some defect in the packing, still, if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing. See *Jaggard, Torts*, 1064; *McCarthy & Baldwin v. Louisville & N. R. Co.* 102 Ala. 193, 14 South. 370, 48 Am. St. 29. It is right here that we think the evidence in this case presents a question of fact for the jury, to determine whether it was manifest to the defendant that the marble could not be carried with safety in the manner in which it was crated. The motion for judgment was therefore properly denied, and the judgment is affirmed.

HOLT, J., took no part.

**MARTIN KIEFER v. IRWIN W. TOLBERT.<sup>1</sup>**

March 5, 1915.

No. 19,020—(250).

**Bills and notes — alteration — transfer without indorsement.**

The plaintiff, without the request or knowledge of the defendant, undersigned, prior to delivery, notes made by him to another in part payment of the purchase price of property, to give them additional credit. Prior to maturity the plaintiff paid money or its equivalent for the notes, and they were delivered to him by a collecting agent of the payee without indorsement. It is *held*:

(1) That the undersigning of the notes by the plaintiff, without the request or knowledge of the defendant, did not amount to a material alteration discharging him from liability.

(2) That upon payment the collecting agent of the payee was authorized to deliver the notes to the plaintiff; that such delivery, though without indorsement, transferred the legal title; and that the plaintiff was entitled to recover of the defendant the amount which he paid subject to such defenses as the defendant had against the payee.

Action in the district court for Olmsted county to recover \$390 upon two promissory notes. The case was tried before Snow, J., who made findings and dismissed the action. From the judgment entered pursuant to the order for judgment, plaintiff appealed. Reversed.

*Charles C. Willson*, for appellant.

*Thomas Spillane*, for respondent.

DIBELL, C.

Action, tried to the court, upon two notes made on October 14, 1901, by the defendant Tolbert to the Plano Manufacturing Co. and

<sup>1</sup> Reported in 151 N. W. 529.

---

Note.—Upon the right of a transferee without indorsement of a bill or note payable to order of transferrer to protection as a bona fide purchaser, see note in 17 L.R.A.(N.S.) 1105.

alleged to have been "sold, assigned, transferred and delivered" to the plaintiff Kiefer. There were findings for the defendant and the plaintiff appeals from the judgment entered pursuant thereto.

The two notes were given in part payment of a husker and shredder purchased by Tolbert of the Plano Company. The company refused to deliver the machine without a surety on Tolbert's notes. Kiefer, who was interested in a commission on the sale, signed the notes underneath the signature of Tolbert, who knew nothing of his signing until the trial many years later. There is no finding that the Plano Co. knew, or did not know, that Kiefer signed without the request or knowledge of Tolbert. The finding is that Kiefer signed before delivery to give additional credit and that the indebtedness was that of Tolbert alone. The Plano Co. knew this. Some of the evidence preserved in the bill of exceptions suggests that the arrangement that Kiefer should sign was with him and the company; but there is no finding.

The case is before us on the findings and a bill of exceptions. There is no settled case. In some respects the scope of our review is limited.

1. The signing of the notes by Kiefer, under the circumstances recited, was not such a material alteration as discharged Tolbert from liability. *First Nat. Bank v. Weidenbeck*, 97 Fed. 896, 38 C. C. A. 131, reversing 87 Fed. 271; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Barnes v. Van Keuren & Floyd*, 31 Neb. 165, 47 N. W. 848; *Muir v. Demaree*, 12 Wend. 468; *Mersman v. Werges*, 112 U. S. 139, 5 Sup. Ct. 65, 28 L. ed. 641. See *Babcock v. Murray*, 58 Minn. 385, 59 N. W. 1038, and *Ward v. Hackett*, 30 Minn. 150, 14 N. W. 578, 44 Am. Rep. 187. In *First Nat. Bank v. Weidenbeck*, supra, Caldwell, J., said:

"The rights of the obligors are no more affected by the guaranty placed on the note than they would be by a guaranty placed on a separate instrument."

2. A few days before the notes became due they were in the bank for collection and under the control of one Rutherford, the collecting agent of the Plano Company. He took them from the bank and

delivered them to Kiefer, who, in the language of the findings, "paid for the notes so transferred to him money or its equivalent, the amount whereof does not clearly appear from the evidence." The court found that Rutherford's authority was insufficient; and that there was not a sale or transfer or delivery by the Plano Co. In this we think it was in error. The bill of exceptions contains all the evidence on this point. Rutherford was in charge of the notes to get payment. When he got payment from Kiefer the notes properly went to him. The company took Kiefer as surety. It knew that he was not the principal obligor. Tolbert's obligation was not extinguished when Kiefer made the payment. Neither the Plano company nor Kiefer intended it so. Kiefer was entitled to receive of Tolbert the amount which he paid in discharge of Tolbert's obligation, subject to any defense of Tolbert against the Plano company. The situation justifies no other view. The notes, it is true, were not indorsed; but there was a manual delivery. A note payable to order, and these were, is transferable by delivery without indorsement. The transferee in such a case is not a *bona fide* holder, and his possession is not proof of title; but if he has possession under an authorized transfer and delivery he has legal title.

Upon the evidence, Kiefer was entitled to recover against Tolbert, unless he had a defense to the notes as against the Plano company.

The plaintiff asks a direction of judgment against the defendant. This cannot be given. We cannot make findings of fact. A further finding is necessary to justify a conclusion in favor of the plaintiff. Besides, Tolbert interposed a defense based upon a breach of the warranty in the sale of the husker and shredder. He could not appeal, and he is entitled to the opinion of this court upon his defense.

Judgment reversed.

**ELIAS SHAMA v. CHICAGO, MILWAUKEE & ST. PAUL  
RAILWAY COMPANY.<sup>1</sup>**

**March 5, 1915.**

**Nos. 19,031—(252).**

**Bill of lading — time of filing claim — waiver.**

The bill of lading under which certain merchandise was shipped by plaintiff over defendant's road provided that claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Part of the merchandise was lost while in possession of the carrier. It is *held*:

(1) The evidence conclusively showed that defendant waived strict compliance with this provision of the bill of lading.

(2) The issue of waiver was litigated by consent.

(3) There was no prejudicial error in the admission of evidence or in the charge.

Action in the municipal court of Mankato to recover \$215 for failure to deliver a box of dry goods shipped over defendant's road. The case was tried before Comstock, J., and a jury which returned a verdict in favor of plaintiff for \$106.60. From an order denying its motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

*F. W. Root, N. J. Wilcox and C. J. Laurisch, for appellant.*

*C. O. Dailey, for respondent.*

BUNN, J.

On May 31, 1912, plaintiff delivered to defendant, at Webster, South Dakota, seven boxes of merchandise to be shipped to plaintiff at Roscoe in the same state. One box was missing when plaintiff called for the goods at Roscoe in September, 1912, and this fact was noted on a written statement given plaintiff at the time by

<sup>1</sup> Reported in 151 N. W. 406.

the agent at Roscoe, who then and again two weeks later asked for time in which to investigate. Some time between November, 1912, and February, 1913, plaintiff called upon defendant's agent at Mankato, Minnesota, where plaintiff resided and from where the goods were originally shipped, and presented the bill of lading, the Roscoe agent's notation that the box was short, and an itemized statement of the contents of the missing box. These papers were received by the Mankato agent. Nothing further seems to have been done until November 13, 1913, when plaintiff's attorney wrote to the general freight claim agent of the defendant in regard to the claim. The reply was that the company had investigated the case thoroughly, but had been unable so far to obtain satisfactory proof of the loading of the shipment, and promised to give the claim further consideration if there was furnished an affidavit of the shipper as to the shipment and a certified copy of the original invoice for the goods.

The action was brought in December, 1913, to recover the value of the goods contained in the lost box. There was a verdict for plaintiff and defendant appealed from an order denying its motion for judgment *non obstante* or for a new trial.

There was no dispute that the box of merchandise was lost while in defendant's charge and no doubt of its liability to plaintiff, except for the defense that a claim for the loss was not made to the carrier in the manner or within the time specified in the bill of lading. The condition in that regard was as follows:

"Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

Technically plaintiff did not comply with this condition of his bill of lading, in that the claim was not made in writing to the agent at Roscoe or the agent at Webster. But a claim was made verbally to the agent at Roscoe, who acknowledged the loss and asked for time to look it up. A claim was made in writing to the

agent at Mankato within "four months after a reasonable time for delivery had elapsed." No request was made by the agent for any different form of claim or any other manner of presentation. The object of this provision in the contract of shipment is to enable the carrier to intelligently investigate the merits of a claim while the evidence is accessible. *Banks v. Pennsylvania R. Co.* 111 Minn. 48, 126 N. W. 410. The carrier in this case had full knowledge of the plaintiff's claim within the time limited by the bill of lading. We think that a waiver of strict compliance with the contract as to the time, manner and place of presenting a claim for the loss was conclusively shown. It appears from the admission in writing of the agent at Roscoe that the box was missing, his request for time to investigate, the reception without objection by the Mankato agent of the itemized list of the goods and the other papers in regard to the claim, and the letter of defendant's claim agent. This letter was not in itself a waiver, but it indicated quite conclusively that the company had investigated the claim on its merits, not relying on any failure to present the claim within the proper time, in the proper manner or to the proper agent. We find no difficulty in holding that defendant intended to relinquish the right it had to insist on strict performance by plaintiff of the conditions in this regard, or that plaintiff was deceived into believing and acted on the belief that defendant had abandoned this right. There is nothing in *Gamble-Robinson Commission Co. v. Northern Pacific Ry. Co.* 119 Minn. 40, 137 N. W. 19, inconsistent with this conclusion. On the contrary that case supports the view that there was a waiver here. So does *Banks v. Pennsylvania R. Co.* *supra*.

The point is made that a waiver was not pleaded. This is true, as the answer alleged the breach of the condition in the bill of lading and the reply was a general denial. But this issue was, we think, litigated by consent. The evidence to show a waiver was not objected to upon the specific ground that a waiver was not pleaded.

We find no reversible error in the rulings on the admission of evidence or in the charge.

Order affirmed.

LOUISA LAMONT and Others v. WILLIAM H. LAMONT  
and Another.<sup>1</sup>

March 5, 1915.

Nos. 19,039—(254).

**Action to set aside foreclosure — homestead — deposition.**

In this action to set aside the foreclosure of a mortgage on the grounds that the mortgagor, at the time the mortgage was executed, was married, that the property was the homestead, and that the wife did not join in the mortgage, it is *held*:

(1) It was error to receive in evidence on the issue of marriage, a judgment in a prior action to which the defendant here was not a party. The error was prejudicial.

(2) Conceding that the refusal of a witness to answer material questions asked on cross-examination is ground for suppressing the deposition of such witness, the motion to suppress must be made within 10 days after notice of the return of the deposition as provided by G. S. 1913, § 8393.

(3) Declarations of the mortgagor, since deceased, tending to indicate his claim that the property was his homestead, and made while he was the owner and in possession of the property, were properly received in evidence.

Action in the district court for Le Sueur county to cancel a mortgage and to set aside its foreclosure. The case was tried before Morrison, J., who made findings and ordered judgment in favor of plaintiffs. From an order denying defendants' motion for a new trial, they appealed. Reversed.

*Moonan & Moonan and Francis Cadwell, for appellants.*

*R. L. Penney, for respondents.*

BUNN, J.

John Lamont owned a 15-acre tract of land in Le Sueur county and on November 6, 1905, executed a mortgage thereon to defendant Dressel, to secure \$75 and interest. The mortgage was assigned to defendant William H. Lamont and was foreclosed by him in De-

<sup>1</sup> Reported in 151 N. W. 416.

ember, 1910. There was no redemption. Plaintiff Louisa Lamont claims to be the widow of John Lamont, and the other plaintiffs are their children. They brought this action to cancel the mortgage and set aside the foreclosure thereof, on the ground that plaintiff Louisa Lamont was the wife of John Lamont at the time the mortgage was executed, did not join therein, and that the property was their homestead. Louisa did not in fact join in the mortgage, it being executed by John Lamont alone as a "widower." The issues made by the pleadings and tried by the court without a jury were these: (1) Were John Lamont and Louisa Lamont husband and wife at the time the mortgage was executed? (2) Was the property their homestead? The court decided both of these questions in the affirmative, and granted judgment for plaintiff. This appeal is from an order denying a new trial.

If the findings of the trial court are sustained by the evidence, and, if there was no prejudicial error in admitting or excluding evidence, the decision was correct and the order appealed from must stand. But it must be reversed, if the evidence is insufficient to sustain the finding that John Lamont and Louisa Lamont were husband and wife at the time the mortgage was executed, or the finding that the tract was their homestead. The same result must follow, if there was prejudicial error in admitting or excluding evidence on the material issues.

We regard the evidence as plainly sufficient to sustain the findings assailed, but it is not conclusive. There was a sharp controversy, especially on the question of the marriage, and the court might have decided either way. It is therefore necessary to consider the claims of error in the admission of testimony.

1. The first claim of error is based on these facts: The trial court received in evidence, over the defendant's objection, the judgment roll, consisting of the pleadings, decision and judgment, in an action brought in 1899 by one Brossard against John Lamont and Louisa Lamont. That action was to determine the adverse claims of the defendants to a 110-acre tract of land, not including the land involved in the instant case. The defendants answered separately, each claiming that 80 acres of the tract was their homestead, that they were hus-

band and wife, and that a deed executed by John Lamont to plaintiff in 1866 was void because Louisa did not join therein. Plaintiff replied to these answers, specifically denying that John Lamont was married at the time he executed the deed, and denying that he ever occupied any portion of the premises as a homestead. The case was tried in 1897, and resulted in a decision that the Lamonts were married at Warsaw in Rice county in 1865, that they lived upon the land as husband and wife until 1871, when Louisa left and never afterwards lived upon the premises. It was further found that the land was not the homestead of John Lamont, and the conclusions of law were that the deed conveyed the land to plaintiff, subject to the inchoate right of Louisa Lamont under the statutes. Judgment was ordered accordingly but was not entered until in July, 1899. Prior thereto, and in May, 1899, defendants withdrew their answers, and it was stipulated that judgment might be entered for the plaintiff as prayed for in the complaint, but without costs to either party. Judgment was ordered pursuant to this stipulation and entered July 18, 1899. The judgment recites in full the decision, but purports to be entered on motion of the attorney for the plaintiff and in accordance with the stipulation and order for judgment made thereon, and simply adjudges that plaintiff is the owner of the land, and that "defendants have not, nor has either of them any right, title, interest, lien or estate of, in or to said premises or to any part or portion thereof."

Was this judgment admissible as evidence to prove the fact of marriage in the present case? Defendants here were not parties to the former suit. The only parties to that action were Brossard and the Lamonts; it was the ordinary statutory action to determine the adverse claims of the named defendants in a particular tract of land. Its object was not to adjudge the status of the Lamonts as being married or single. Whether they were married or not became an essential issue in the case because on that issue depended the rights of one or both of the defendants in the land. No one interested in that issue, the marriage status, was made a party to the case, either by name or as unknown parties, except Brossard and the Lamonts. It was not, particularly as to the issue of marriage, an action *in rem*, in which the judgment "renders the thing adjudicated upon *ipso*

*facto* such as it is thereby declared to be, and therefore of effect between all persons whatever." Broom, Leg. Max. (8th ed.) 750; Morin v. St. Paul, M. & M. Ry. Co. 33 Minn. 176, 22 N. W. 251; Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773, 24 Am. St. 212; Minnesota Debenture Co. v. Johnson, 94 Minn. 150, 102 N. W. 381, 110 Am. St. 354. It is elementary that a judgment is conclusive only as against the parties thereto and their privies. As to strangers it is evidence only of its entry, and not of any fact upon which it was based. Minnesota Debenture Co. v. Johnson, *supra*, and cases cited. The rule that a judgment is admissible as against all the world, when it forms a link in a party's chain of title, plainly does not apply to this case. Nor does the principle announced and applied in Pabst Brewing Co. v. Jensen, 68 Minn. 293, 294, 71 N. W. 384, that "all judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence of the state of things so effected is a fact in issue, or is, or is deemed to be, relevant to the issue." The Brossard action was not brought to establish the marriage status of the Lamonts, but to determine their adverse claims to a particular tract of land. Their status was only incidentally involved. It is doubtful if the judgment did in fact determine the fact of marriage, as the answers presenting this issue were withdrawn, and the judgment entered as on default, and simply adjudging that defendants had no title to or interest in the land. But whether this is so or not, we discover no ground for holding the judgment evidence as against strangers to it of any fact upon which it was based. It has been held that a judgment is *prima facie* evidence even as against strangers of any fact which, from its nature, is provable by evidence of general reputation. 23 Cyc. 1287. This claim was made to sustain the admission of the judgment in Morin v. St. Paul, M. & M. Ry. Co. *supra*, where the fact to be proved was the death of a person, but the judgment was held inadmissible. We think that this doctrine, if sound at all, should not be applied where the fact to be proved is that of marriage, though it is true that evidence of general reputation is admissible on such an issue. See Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L.R.A. 836.

Our conclusion is that the judgment in the Brossard case was not

competent evidence in the case at bar of the marriage of the Lamonts. *Morin v. St. Paul M. & M. Ry. Co.* supra; 2 *Dunnell*, Minn. Dig. §§ 5154 to 5158, and cases cited. 23 Cyc. 1280, 1410, and cases cited.

We are unable to say that the trial court's decision was not influenced by the evidence. The record strongly indicates that it was. The error must therefore be held prejudicial.

2. There are other questions that should be disposed of in order to guide the court below on another trial. The first of these is whether it was error to receive in evidence the depositions of plaintiff Louisa Lamont and two other witnesses over the objections that these witnesses refused to answer material questions put to them on cross-examination. The questions which plaintiff, on the advice of counsel, refused to answer were whether she had ever been married since leaving Lamont, whether she was married to a certain man on a certain date and whether she did not live with still another man as his wife at another time after leaving Lamont. Plaintiff's two witnesses, whose testimony on direct tends to show a marriage between plaintiff and Lamont, refused on cross-examination to answer whether or not plaintiff was known in the community where she and they lived as the wife of the other man. The evidence sought to be obtained by the questions which the witnesses refused to answer was material, we think. It had a bearing on the issue of marriage. Plaintiff's refusal to answer may have been justified, as her answers might be self incriminating, but the other witnesses had no legal reason whatever for refusing to answer the interrogatories. There is a conflict of authority as to whether the refusal of a witness to answer a material question asked on cross-examination is ground for suppressing his deposition. Probably the majority rule is that the deposition may be suppressed upon that ground, and perhaps this has been assumed by this court to be the correct rule. *McMahon v. Davidson*, 12 Minn. 232 (357); *Stone v. Evans*, 32 Minn. 243, 246, 20 N. W. 149; 4 Enc. Ev. pp. 421, 422, and cases cited. But because the witness may be compelled to testify, and the suppression of his deposition may punish an innocent party rather than the contumacious witness, some courts refuse to suppress on this ground. 4 Enc. Ev. 421, 422; *Jones*, Ev. § 689. Whatever the correct rule may be in this

regard, we think that the objection must be taken by a motion to suppress the deposition, which motion must be made as provided by the statute (G. S. 1913, § 8393), within 10 days after written notice of the return thereof. This notice was duly given in the case at bar, and the motion to suppress was not made within 10 days thereafter or indeed until the depositions were offered on the trial, which was some two months later. This is a reasonable rule, just to both parties, and we adopt it. See Jones, Ev. § 686, and cases cited.

3. Witnesses were permitted to testify over objection to declarations of John Lamont, since deceased, tending to show that he claimed the property as a homestead. This was not error. *Hayes v. Hayes*, 126 Minn. 389, 148 N. W. 125.

The error in receiving in evidence the judgment in the Brossard case necessitates a new trial.

Order reversed.

---

STATE ex rel. IZZIE H. W. LAWTON v. DISTRICT COURT  
OF HENNEPIN COUNTY.<sup>1</sup>

December 24, 1914.

No. 19,178.

**Mandamus — appealable order.**

Where the district court interpreted the decision upon the former appeal as not necessitating a new trial, relator's remedy to review that interpretation is by appeal and not by *mandamus*. [Reporter.]

Upon the petition of Izzie H. W. Lawton this court made an order directing the district court for Hennepin county to show cause why a writ of *mandamus* should not issue requiring that court to grant petitioner a new trial. Upon the return day respondent moved to dismiss the writ upon the ground that *mandamus* was not the proper remedy. Motion to dismiss granted.

*William P. Roberts* and *Horace W. Roberts*, for relator.

*Ralph T. Boardman*, for respondent.

<sup>1</sup> Reported in 149 N. W. 1070.

## PER CURIAM.

This is an order to show cause issued by this court directing the district court of Hennepin county to show cause why a writ of *mandamus* should not issue commanding it to grant the relator a new trial. Upon the return day the respondent moved to dismiss the writ upon the ground that *mandamus* was not the proper remedy.

The relator is the defendant in the case of *Fiske v. Lawton*, 124 Minn. 85, 144 N. W. 455, decided December 19, 1913. The judgment from which the appeal in that case was taken was reversed without a specific direction. After the going down of the remittitur and on July 27, 1914, the plaintiff moved the court to amend its findings of facts and conclusions of law and to order judgment in her favor. On September 30, 1914, the court granted said motion. On November 7, 1914, the relator moved the court to vacate the order of September 30, 1914, or to grant a new trial, and on November 30, 1914, the court denied the motion.

The court below having acted in the matter, and held that in view of the grounds of the decision of this court a new trial was not intended and does not necessarily follow, relator's remedy to review that decision is by appeal and not by *mandamus*.

The motion to dismiss is granted.

---

MORRIS NOODELMAN v. CITY OF MINNEAPOLIS.<sup>1</sup>

January 15, 1915.

Nos. 18,957-(184).

**Eminent domain — appeal.**

Notice of protest against award of damages by commissioners held sufficient under Laws 1913, c. 345, to permit an appeal to the district court, and it was error to dismiss the appeal. [Reporter.]

Appeal by Morris Noodelman from an order of the district court for Hennepin county, Steele, J., dismissing his appeal to that court from an order of the city council of Minneapolis confirming the award of commissioners in the matter of condemnation of land. Reversed.

George B. Leonard and M. Rose, for appellant.

C. D. Gould and William H. Morse, for respondent.

<sup>1</sup> Reported in 150 N. W. 308.

**PER CURIAM.**

Under Laws 1913, p. 488, c. 345, any person who is dissatisfied with the amount of damages awarded to him in the condemnation proceedings authorized by said chapter may file with the city clerk, in writing, his objection to the confirmation of the award; and if the award is confirmed he may appeal to the district court. The plaintiff filed this notice with the city clerk:

"The undersigned \* \* \* do hereby protest against the award of the commissioners appointed by the said council in the above entitled matter, on the grounds that said award is inadequate."

Afterwards he gave proper notice of appeal to the district court. The district court dismissed his appeal upon the ground that his notice was insufficient. The notice, while not in the precise form fixed by the statute, sufficiently apprised the council of all that it was requisite that it should know. It was error to dismiss the appeal.

Order reversed.

---

**LOUIS BERNSTEIN v. CITY OF MINNEAPOLIS.<sup>1</sup>**

January 15, 1915.

Nos. 18,958-(185).

**Case followed.**

Appeal by Louis Bernstein from an order of the district court for Hennepin county, Steele, J., dismissing his appeal to that court from an order of the city council confirming the award of commissioners in the matter of condemnation of land. Reversed.

*George B. Leonard* and *M. Rose*, for appellant.

*C. D. Gould* and *William H. Morse*, for respondent.

**PER CURIAM.**

This case follows *Noodelman v. City of Minneapolis*, *supra*, page 531.  
Order reversed.

<sup>1</sup> Reported in 150 N. W. 398.

**ALTON J. MILTON v. JOHN H. GREER and Another.<sup>1</sup>**

January 29, 1915.

Nos. 18,977-(201).

**Exchange of property — evidence.**

Action to rescind exchange of property because of fraudulent misrepresentations. Judgment in favor of plaintiff. *Held*: The evidence justifies the decision and the court did not err in overruling objections to the admission of certain evidence. [Reporter.]

Action in the district court for Hennepin county for the reconveyance of certain real estate. The case was tried before Molyneux, J., who denied defendants' motion to dismiss the action, made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

*O. M. Peabody*, for appellants.

*Latham & Pidgeon*, for respondent.

**PER CURIAM.**

The parties to this action made an exchange of properties whereby plaintiff conveyed to defendant John H. Greer 120 acres of timber land in the state of Washington, and defendants conveyed to plaintiff 40 acres of land in Renville county, Minnesota, and a lot in a suburb of Minneapolis. Neither party saw or examined the property of the other before making the exchange. Shortly after examining the property which he had acquired, plaintiff brought this action, in which he alleged that Greer had fraudulently misrepresented the condition, character and value of such property and the amount of a ditch lien against the 40-acre tract, and that he, plaintiff, had relied upon such representations in making the exchange, and asked for a rescission of the transaction. The trial court found the facts to be as claimed by plaintiff and rendered judgment granting the relief demanded. Defendants who are husband and wife took a joint appeal from the judgment. The questions presented for consideration by the assignments of error are whether the findings are sustained by the evidence, and whether the court erred in overruling objections to the admission of certain evidence. We have examined the record with care and find that the evidence fully justifies the conclusions of the trial court, and that the rulings assigned as error were correct.

Judgment affirmed.

<sup>1</sup>Reported in 150 N. W. 1102.

AGNETHE C. ANDERSON v. F. W. MEYER and Another.<sup>1</sup>

January 29, 1915.

Nos. 18,981-(191).

**Notice to quit sufficient.**

**Action of unlawful detainer. Held:** A month's notice to quit premises leased from month to month entitled plaintiff to possession. [Reporter.]

Action in justice court for forcible entry and unlawful detainer. From a judgment in favor of defendants, plaintiff appealed to the district court for Goodhue county, where the appeal was heard before Johnson, J., who made findings and ordered judgment in favor of plaintiff. From the judgment entered pursuant to the order for judgment, defendants appealed. Affirmed.

*A. J. Rockne*, for appellant.

*Lind, Ueland & Jerome*, for respondent.

PER CURIAM.

Action of unlawful detainer commenced before a justice of the peace and tried *de novo* upon appeal to the district court, where there was judgment for the plaintiff for restitution from which the defendants appeal.

The evidence is not before us. The findings are inconsistent; but upon a consideration of them we think it must be held that the plaintiff, who took title by descent in 1910, at which time the defendants were holding over after the expiration of a leasehold interest, thereafter and in 1911 made a lease to the defendants of certain premises, including a part of the premises leased them by her ancestor, and certain premises additional thereto, at an increased rental, this lease being from month to month. A month's notice to quit was given and this entitled the plaintiff to possession.

Judgment affirmed.

<sup>1</sup>Reported in 150 N. W. 1102.

**FERDINAND ZIEMON and Another v. EMMA DIESSNER.<sup>1</sup>**

January 29, 1915.

Nos. 18,993-(203).

**Finding not sustained by evidence.**

The finding that appellant's deed was delivered to the grantee named in it is not supported by the evidence. [Reporter.]

Action in the district court for Carver county to determine adverse claims to two lots. The case was tried before Morrison, J., who made findings and ordered judgment in favor of plaintiffs. From an order denying her motion for a new trial, Emma Diessner appealed. **Reversed.**

*Francis Muekel*, for appellant.

*Alfred E. Rietz*, for respondents.

**PER CURIAM.**

Action by plaintiffs to determine adverse claims to two lots in Waconia, Minnesota. The trial court decided for plaintiffs. Defendant Emma Diessner appealed from an order denying her motion for a new trial.

Defendant Henry R. Diessner, husband of the appellant, owned the lots on April 1, 1905. On that date he gave a quitclaim deed thereof to one Friederich. His wife did not join in the deed. Friederich conveyed by warranty deed to Gatz. Gatz conveyed by warranty deed to plaintiffs. Admittedly appellant's inchoate statutory right in the land as the wife of Diessner has never been released or lost by her, unless the evidence sustains the findings of the trial court that, after the conveyance by Gatz to plaintiffs, she signed, executed and delivered to Gatz a quitclaim deed to the lots.

We would like to sustain this finding, but are unable to do so. We think that it conclusively appears that the deed was never delivered to Gatz or accepted by him. The evidence was substantially this: Plaintiffs wanted a quitclaim deed from appellant to correct their title; Diessner procured his wife to execute one to Gatz; he made a bargain with Gatz that his wife would give him the deed if Gatz would sign a satisfaction of a judgment he held against Diessner; Gatz "agreed partly" to this, and the deed was placed with the cashier of a local bank to be delivered to Gatz in case "he came up to the bargain" when "the papers were signed." Gatz never satisfied the judgment. Diessner afterwards

<sup>1</sup> Reported in 150 N. W. 1103.

paid it, and took back the deed. Gatz testified that he never received the deed, refused to do so. The cashier offered to deliver the deed to Gatz, but he refused to take it. Together they visited the office of the register of deeds and the cashier asked to have the deed recorded. Gatz consulted the county attorney as to whether the deed would pass the title; the opinion given does not appear, but the register refused to record the deed, it was retained by the cashier, afterwards returned to Diessner and destroyed. It requires no more than this statement of the evidence to show that the finding of a delivery of the deed to Gatz has no support in the evidence.

Order reversed.

---

**TOM DAVIS and Another v. GREAT NORTHERN RAILWAY  
COMPANY.<sup>1</sup>**

(WESSE CASE)

February 5, 1915.

Nos. 19,035-(240).

**Case followed.**

Action in the district court for Lyon county to enforce an attorney's lien for \$3,000. The answer alleged a settlement with and payment to James H. Wesse of the sum of \$1,000. The case was tried before Olsen, J., who made findings and ordered judgment in favor of plaintiffs for \$522.30. From the judgment entered pursuant to the order for judgment, defendant appealed. Affirmed.

*M. L. Countryman and A. L. James, for appellant.*

*Davis & Michel, for respondents.*

**PER CURIAM.**

The questions involved in this action are identical with those presented in the case of Davis against the Great Northern Railway Co., *supra*, page 354, 151 N. W. 128, and the conclusion there reached is decisive of this case.

It is therefore ordered that the judgment appealed from be and the same hereby is affirmed.

<sup>1</sup> Reported in 151 N. W. 130.

**CAPITAL TRUST COMPANY v. GREAT NORTHERN  
RAILWAY COMPANY.<sup>1</sup>**

February 5, 1915.

No. 19,122.

**Case followed.**

After the former appeal reported 127 Minn. 144, 149 N. W. 14, defendant appealed from a judgment entered in favor of plaintiff in the district court for Ramsey county. Affirmed.

*M. L. Countryman and A. L. Jones, for appellant.*

*Samuel A. Anderson and A. F. Storey, for respondent.*

**PER CURIAM.**

This appeal from the judgment having been, by stipulation of the parties, submitted upon the same printed record and briefs upon which the appeal from the order denying defendant's motion for judgment notwithstanding the verdict or for a new trial was heard and determined, the judgment is affirmed.

---

**STATE ex rel. ROSE FELTON v. P. H. STOLBERG.<sup>2</sup>**

February 8, 1915.

No. 19,237.

**Settlement of case—discretion of court.**

Granting or refusing a motion for leave to "settle" a case after the time limited by statute, rests largely in the discretion of the trial court. Only in a case of clear abuse of such discretion will this court interfere. In this case the trial court did not abuse its discretion. [Reporter.]

Upon the relation of Rose Felton this court issued its alternative writ of *mandamus* directed to Honorable P. H. Stolberg, as judge of the Nineteenth judicial district, to settle a "case," in an action in the district court for Ramsey

<sup>1</sup> Reported in 150 N. W. 1102.<sup>2</sup> Reported in 150 N. W. 924.

county between relator and the St. Paul City Railway Co. Respondent's motion to discharge the writ was granted.

*James R. Hickey*, for relator.

*W. D. Dwyer*, for respondent.

PER CURIAM.

This is a *mandamus* proceeding to compel the respondent district court to "settle" a case. The motion to settle the case was made long after the statutory time had expired and after the expiration of all stipulations and orders extending the time. Some matters in excuse were set forth by appellant, but these were addressed to the discretion of the trial court. There was no fact which was conclusive upon the parties or the court. Respondent retained the proposed case, but this was not a waiver of the objection that it was not served in time. *State v. Powers*, 69 Minn. 429, 432, 72 N. W. 705. The granting or refusing of a motion for leave to settle a case after the time limited by the statute, rests largely in the trial court's discretion, and only in a case of clear abuse of such discretion will this court interfere. *State v. Powers*, supra. We cannot hold that the trial court abused its discretion in this case.

---

CATHERINE BAKER v. PHILIPINE SCHULZ and Others.<sup>1</sup>

February 11, 1915.

Nos. 19,016-(233).

Case followed.

Action in the district court for Hennepin county for partition. The case was tried before Hale, J., who made findings and ordered judgment for partition according to the respective interests of the parties. From an order denying defendants' motion for a new trial and for amended and substituted findings of fact and conclusion of law, they appealed. Affirmed.

*George E. Young* and *R. M. Hayes*, for appellants.

*George Harold Smith* and *Francis B. Hart*, for respondent.

PER CURIAM.

This case is ruled by the decision in *Young v. Baker*, supra, page 398, 151 N. W. 132, and for the reasons stated in the opinion in that case the order appealed from is affirmed.

<sup>1</sup> Reported in 151 N. W. 134.

**ALVA R. HUNT v. MEEKER COUNTY ABSTRACT & LOAN COMPANY.<sup>1</sup>**

April 16, 1915.

Nos. 18,945—(160).

**Costs — motion to vacate levy of execution.**

Costs in an action to determine whether plaintiff had the right to enforce a partition of real estate are not expenses of making the partition, within the meaning of G. S. 1913, § 8037. Hence, a motion to vacate the levy of an execution upon a judgment for costs in such action must be denied. [Reporter.]

Respondent moved for an order restraining the enforcement of the execution issued upon the judgment for costs, and for an order setting aside the levy made under such execution on the ground that the statutes provide that the costs in partition actions shall be apportioned and adjusted by the court and paid out of the proceeds of the sale of the property involved; that the costs of the action have never been apportioned by the court; and that appellant is not entitled to enforce an execution for the costs of the action against the individual property of respondent. Motion denied.

*R. H. Dart*, for respondent.

*Alva R. Hunt and E. W. Campbell*, for appellant.

**PER CURIAM.**

This action was brought to compel the partition of certain real estate. Defendant denied plaintiff's right to enforce such partition and the trial court sustained defendant's contention and dismissed the action. Plaintiff appealed and this court reversed the trial court. *Hunt v. Meeker County Abstract & Loan Co.* supra, page 207, 150 N. W. 798. Plaintiff taxed his costs in this court and caused judgment to be entered therefor, and thereafter caused an execution to be issued upon the judgment and a levy to be made thereunder.

Defendant now moves to vacate such levy and to enjoin further proceedings under the execution, upon the ground that the costs in partition proceedings should be apportioned between the parties or be paid out of the proceeds of the property. This motion must be denied for the reason that the costs in controversy were incurred in an adversary proceeding to determine whether plaintiff possessed the right to enforce a partition and are not expenses of making the partition within the meaning of section 8037, G. S. 1913. See *Hanson v. Ingwaldson*, 84 Minn. 346, 87 N. W. 915.

Motion denied.

<sup>1</sup> Reported in 151 N. W. 1102.



# INDEX

---

**ABANDONMENT.** See **MECHANIC'S LIEN, 2a.**

OF TITLE.

See **MORTGAGE, 4.**

1. It is the settled rule in this state that a vested title to real estate, though it may pass to another by adverse possession or estoppel, is never lost by abandonment.

—Purcell v. Thornton, 258.

OF COUNTERCLAIM.

2. Where defendant was not present at the time the action was set for trial and tried, he must be deemed to have abandoned the counterclaim set up in his answer.

—H. W. Johns-Manville Co. v. Great Northern Hotel Co. 312.

**ACCOUNTING.** See **CONTRACT, 10; VENDOR AND PURCHASER, 4.**

**ACTION.** See **EMINENT DOMAIN, 7; REPLEVIN; TORT.**

**ACTION TO RECOVER AWARD IN CONDEMNATION PROCEEDINGS.**

See **EMINENT DOMAIN, 3.**

**RIGHT OF ACTION UNDER G. S. 1913, § 6998.**

See **FRAUDS (STATUTE OF), 2.**

**RIGHT OF ACTION.**

See **ATTORNEY AND CLIENT, 7; CORPORATION, 3; COURT (MUNICIPAL).**

**DISMISSAL OF ACTION.**

See **DISMISSAL AND NONSUIT, 1, 2.**

**ADVERSE CLAIM.****NEW TRIAL.**

1. Action by the holder of a tax title to determine adverse claims to a vacant city lot. *Held*: The defects in the notice of expiration of redemption from tax sale relied on were not material and the court erred in denying a new trial.

—Fortier v. Parry, 236.

**COSTS OF ACTION.**

2. The court did not err in awarding costs to defendant.

—Kipp v. Love, 499.

**LIEN OF JUDGMENT.**

3. Action to determine adverse claims. Judgment for defendant, subject to the tax liens of plaintiff. The record fails to disclose that plaintiff, as holder of tax liens, was entitled to a larger amount than awarded; and she has no cause for complaint that it was adjudged against defendant's lands as a whole, instead of placing specific amounts thereof against each tract.

—Kipp v. Love, 499.

**ADVERSE POSSESSION.** See **ABANDONMENT**, 1.

**AFFIDAVIT.** See **EVIDENCE**, 7; **MECHANIC'S LIEN**, 10, 11; **PLEADING**, 1.

**ALIEN.** See **DEATH**, 1.

**ALTERATION OF INSTRUMENT.**

The plaintiff, without the request or knowledge of the defendant, undersigned, prior to delivery, notes made by the latter to another in part payment of the purchase price of property to give them additional credit. Prior to maturity the plaintiff paid money or its equivalent for the notes, and they were delivered to him by a collecting agent of the payee without indorsement. It is *held* that the undersigning of the notes by the plaintiff, without the request or knowledge of the defendant, did not amount to a material alteration discharging him from liability.

—Kiefer v. Tolbert, 519.

**AMENDMENT.** See **TRIAL**, 4.

**ANIMAL.** See **APPEAL AND ERROR**, 23; **DAMAGES**, 11, 12; **HIGHWAY**, 1, 2.

**VICIOUS ANIMAL AT LARGE.**

1. It is not negligence *per se* to cross a field where cattle are pastured, un-

**ANIMAL—Continued.**

less there is knowledge that among them is an animal which is likely to make an unprovoked attack.

—Engbretson v. Bremer, 235.

2. Plaintiff was not a trespasser, and defendant owed her the duty to see that a vicious animal was not allowed to run at large in the pasture.  
—Engbretson v. Bremer, 232.

**ACTION FOR PERSONAL INJURY.**

See MASTER AND SERVANT, 23, 26.

3. Plaintiff sustained personal injuries from an attack by a cow belonging to defendant. It is *held*: The evidence was sufficient to justify the jury in finding that the animal was vicious, that defendant had prior knowledge of her character, and that he ought not to have allowed her to run at large in a pasture which with his knowledge and consent was constantly traveled by the children of neighbors and others  
—Engbretson v. Bremer, 232.

4. The evidence justified the jury in finding that plaintiff was not guilty of contributory negligence.  
—Engbretson v. Bremer, 232.

**APPEAL AND ERROR.****IN COUNTY DITCH PROCEEDING.**

See DRAIN, 1.

**AFTER MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT.**

See NEW TRIAL, 2; JUDGMENT NOTWITHSTANDING VERDICT, 2.

**TAXATION OF COSTS ON APPEAL.**

See COSTS, 1.

**WHEN APPEAL CAN BE TAKEN.**

See CONTEMPT, 4, 5; JUDGMENT, 4; NEW TRIAL, 1; REMOVAL OF CAUSE, 2.

1. An order amending a judgment, based on a motion made after the entry and satisfaction of the judgment, affects the substantial rights of the parties and is appealable under G. S. 1913, § 8001, subd. 7.  
—Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. Grimes, 321.
2. Under Laws 1913, p. 699, c. 474 (G. S. 1913, § 8001), an order granting a new trial is not appealable unless it appears therefrom, or from the memorandum attached thereto, that it is granted exclusively on the

**APPEAL AND ERROR—Continued.**

ground of errors of law occurring at the trial; and, when it appears that misconduct was one of the grounds, the order is not appealable.  
—Heide v. Lyons, 488.

**APPEAL FROM AWARD OF COMMISSIONERS.**

See **APPEAL AND ERROR**, 18; **EMINENT DOMAIN**, 13, 14, 18.

3. A party having an interest in the gross award made for land condemned, although no separate award has been made to him for his interest in the land, has the right to appeal from the award of the commissioners.  
—State ex rel. v. District Court of Ramsey County, 439.

**FAILURE TO OBJECT TO CHARGE.**

4. There is ample evidence to establish the facts which under the court's instruction warranted a recovery. No error is assigned upon the charge, and, right or wrong, it must be accepted as the law of this case.  
—Quinn v. St. Paul Boiler & Manufacturing Co. 271.

**FAILURE TO OBJECT TO TAXATION OF DISBURSEMENT.**

5. Defendant, having failed to question an allowance for expert witness fees which was set out as a disbursement in plaintiff's notice of taxation of costs, *held* precluded from objecting thereto on the ground that it was originally allowed by an *ex parte* order made by a district judge other than the one who tried the case.  
—Daly v. Curry, 449.

**JURISDICTION OF DISTRICT COURT.****ON APPEAL FROM AWARD OF COMMISSIONERS.**

See **EMINENT DOMAIN**, 15.

6. An appeal from a nonappealable order and a *supersedeas* bond given thereon do not deprive the district court of jurisdiction to proceed further in the case.  
—Velin v. Lauer Brothers, 10.

**RECORD.****SETTLEMENT OF "CASE."**

7. Granting or refusing a motion for leave to "settle" a case after the time limited by statute, rests largely in the discretion of the trial court. Only in a case of clear abuse of such discretion will this court interfere. In this case the trial court did not abuse its discretion.  
—State ex rel. v. Stolberg, 537.

**APPEAL AND ERROR—Continued.**

**SERVICE OF "CASE."**

8. Respondent's retention of a proposed "case" is not a waiver of the objection that it was not served in time.  
—State ex rel. v. Stolberg, 538.

**REVIEW.**

See JUDGMENT NOTWITHSTANDING VERDICT, 2.

9. Refusal to dismiss an action of personal injury is not available on appeal, if, when the evidence was all in, there was sufficient to go to the jury upon defendant's liability.  
—Quinn v. St. Paul Boiler & Manufacturing Co. 274.
10. On appeal from a judgment, where no motion for a new trial was made, the court has only to inquire whether there was evidence which justified submitting the case to the jury.  
—Velin v. Lauer Brothers, 11.
11. The rule that a motion must be made to strike out improper evidence, in order to raise the question of its admissibility on appeal, does not apply where proper objection to its introduction was made before it was received.  
—Madson v. Christenson, 23.

**EVIDENCE.**

12. Upon appeal, findings of the trial court will not be reversed unless the evidence is clearly and palpably against the conclusions of the trial court.  
—Butler v. Badger, 103.
13. The former presumption that error committed upon the trial of an action is prejudicial, is not now given effect blindly, and it is held with practical unanimity that prejudice in fact must appear before a reversal will be ordered; particularly for error in the admission of immaterial evidence, though the rule is different where competent and material evidence has been erroneously excluded.  
—Moe v. Paulson, 280.

**CONFLICTING EVIDENCE.**

14. This court will not interfere with the action of the trial court in granting or refusing a temporary injunction, where the evidence as to the facts is conflicting and no irreparable injury impends.  
—Twitchell v. Cummings, 391.
15. Action for deceit. Plaintiff's representative having testified that the alleged misrepresentations were made and relied upon, and the de-  
128 M.—35.

**APPEAL AND ERROR—Continued.**

defendants having testified to the contrary, and the dispute having been properly submitted to and determined by the jury, their verdict cannot be disturbed.

—Bragg & Co. v. Goldstein, 64.

16. Action for work and labor. Verdict for plaintiff. Where the evidence was conflicting this court cannot disturb the verdict after the trial court has approved it.

—Meyer v. Saterbak, 306.

**FROM FINDING OF FACT.**

17. Where the question, under all the facts and circumstances, was one of fact for the trial court and the court found in favor of plaintiff, this court cannot interfere with the finding.

—Cowles v. City of Minneapolis, 454.

18. It is the province of the trial court to determine the conclusions to be drawn from conflicting testimony, and the findings of that court must be clearly against the evidence to justify this court in interfering therewith, whether the fact found is required to be established by a preponderance of evidence, or by clear, convincing, and satisfactory proof. The evidence in this case is sufficient to sustain the findings of the trial court to the effect that the written option had subsequently been modified by parol, and that the parol agreement had been acted upon to such an extent as to warrant specific enforcement thereof.

—Murphy v. Anderson, 107.

19. A deed absolute in form may be shown by parol evidence to be in fact a mortgage. To sustain a decision to that effect the evidence must be clear, strong, and convincing, but not necessarily beyond a reasonable doubt.

This court will sustain a finding of the trial court that a deed in form is a deed in fact, unless the evidence clearly and manifestly requires a determination to the contrary.

The evidence in this case is conflicting, and it sustains a finding of the trial court that a deed from plaintiff's grantor to defendant was a deed in fact and not a mortgage.

—Young v. Baker, 398.

**HARMLESS ERROR.**

See FRAUDS (STATUTE OF), 4; NEW TRIAL, 3; TRIAL, 11; WILL, 3.

**ADMISSION AND EXCLUSION OF EVIDENCE.**

20. The improper admission in evidence of a letter from a third party to plaintiff was not reversible error, for the reason that, in substance,

APPEAL AND ERROR—Continued.

the letter was a mere repetition of uncontradicted evidence received without objection.

—Bragg & Co. v. Goldstein, 64.

21. The exclusion of testimony is not reversible error unless it appear affirmatively that such testimony was relevant and material.

—McCoy v. City National Bank of Duluth, 456.

22. Though the trial court in an equity case erroneously excludes testimony bearing upon material facts in issue, and rejects offers to prove them, the case will not be reversed for such errors if with the facts taken as the party offering the proof claims them to be there could be no result in the case other than that reached by the trial court.

—Green v. Northwestern Trust Co. 30.

CHARGE TO JURY.

See APPEAL AND ERROR, 4.

23. Where the defendant in an action for wrongful injury to an animal insists on the trial that the rule of damages is the difference in value before and immediately after the injury, and the evidence upon the subject is limited accordingly, the charge of the court in harmony with the rule so insisted upon is error without prejudice.

—Raski v. Great Northern Railway Co. 129.

24. Where an insurance policy provided that a loss was to be paid on a percentage basis of the damage to the crop, and defendant presented no requests for instructions on that subject, the failure of the court to go more fully into the subject, if error at all, was clearly without prejudice, where the verdict was well within the limits fixed by the contract.

—Johnson v. Minnesota Farmers Mutual Insurance Co. 3.

READING OF PLEADINGS.

25. The failure of the trial court to heed the views of this court, heretofore expressed, with regard to reading pleadings to the jury in the course of the charge, held error, but not prejudicial so as to warrant reversal.

—Peery v. Illinois Central Railroad Co. 119.

PREJUDICIAL ERROR.

See NEW TRIAL, 4; TRIAL, 9.

SECOND APPEAL.

See NEW TRIAL, 1.

SAME—LAW OF THE CASE.

See COMMERCE, 3.

26. Former decision in this action (121 Minn. 280, 141 N. W. 179) followed and applied as the law of the case.

—Blakely v. J. Neils Lumber Co. 465.

**ARCHITECT.** See **MECHANIC'S LIEN**, 2, 2a, 4.

**ARSON.** See **CRIMINAL LAW**, 9.

**ASSIGNMENT.** See **PUBLIC LAND**, 5.

**ASSIGNMENT OF CONTRACT.**

See **CORPORATION**, 2.

**ASSIGNMENT OF LEASE.**

See **CROP**, 1; **VENDOR AND PURCHASER**, 3.

1. Land under lease was sold in May under an executory written contract of sale. The contract by its terms gave possession to the vendee "by assignment of lease." *Held*, the contract gave the vendee the right to the crop for that year, and parol evidence was not admissible to show an agreement that the vendor should have the crop.

—*Pioneer Loan & Land Co. v. Cowden*, 307.

2. An agreement to repurchase shares of bank stock sold to plaintiff's assignor was assignable.

—*First National Bank of Hastings v. Corporation Securities Co.* 341.

**ATTORNEY AND CLIENT.** See **CORPORATION**, 5; **WORDS AND PHRASES**, 1.

**OPINION OF ATTORNEY ON QUESTION OF LAW.**

See **COMPROMISE AND SETTLEMENT**, 1.

**SOLICITING BUSINESS OR MAKING ADVANCES TO POOR CLIENT.**

See **CHAMPERTY AND MAINTENANCE**; **CONTRACT**, 3.

**REFORMATION OF CONTRACT WITH CLIENT.**

See **REFORMATION OF INSTRUMENT**, 1.

**CONTRACT WITH CLIENT.**

See **CONTRACT**, 3.

**CONSTRUCTION OF CONTRACT OF EMPLOYMENT.**

1. Plaintiffs performed legal services for defendant under a contract between them which provided that plaintiffs should receive for their services 30 per cent of any recovery made in proceedings brought that resulted in setting aside the will of defendant's father *in toto*, or annulling *in toto* trusts created by the will. The contract is construed, and it is *held*:
  - (1) The parties contemplated not only a recovery that was available to defendant immediately on the close of the litigation, but also a recovery

## ATTORNEY AND CLIENT—Continued.

secured, but not available to defendant until the termination of a trust by the death of the *cestui que trust*.

- (2) Plaintiffs fully performed the contract and earned the agreed compensation, although the will was not set aside "*in toto*," or the trusts annulled "*into toto*."
- (3) The contract was not void for champerty.  
—Gray v. Bemis, 392.

## CONTRACT WITH ATTORNEY—VOID PROVISION.

2. A stipulation in a contract between attorney and client that the client should not settle the action to be brought without the consent of the attorneys is invalid and does not prevent him from making any settlement of the action that he thinks proper. Such settlement does not relieve the defendant from liability to the attorney upon his lien under G. S. 1913, § 4955.

—Davis v. Great Northern Railway Co. 356.

3. A contract for an attorney's compensation provided that, "if no recovery is made, then we are to be at no expense whatsoever." *Held*: This did not amount to an agreement that plaintiffs were to pay the cost of the litigation, but referred only to expense for attorney's services.

—Gray v. Bemis, 397.

## CONSTRUCTION OF CONTRACT.

4. Defendant settled a personal injury case with the injured person, agreeing to pay him \$4,500 and to reimburse him for any sum he should be compelled to pay his attorneys. Under a contract between the injured person and his attorneys, he was to receive two-thirds and they one-third of any amount received in settlement. It is *held* that this amount was \$4,500 plus the sum the attorneys would be entitled to under their contract, and that the attorneys were entitled to recover of defendant at least \$2,000.

—Johnson v. Great Northern Railway Co. 365.

## ACTION FOR COMPENSATION—EVIDENCE.

5. Action for compensation of an attorney for professional services in defending an action to enjoin the sale of a portion of the assets of a corporation and for the appointment of a receiver. Defense that the services were performed for two of the directors of the corporation personally and not for the corporation. *Held*: The evidence conclusively established that plaintiff was employed by defendant and sustained the verdict as to amount.

—Traxler v. Minneapolis Cedar & Lumber Co. 295.

## ATTORNEY AND CLIENT—Continued.

## VALUE OF SERVICES.

6. A settlement by the parties, without notice to or consent of the attorneys, when made in good faith and without purpose to defraud the attorney, is final and conclusive of the amount of recovery in the action, and is the basis from which the attorney's compensation, fixed by a percentage agreement with the plaintiff, must be determined.

—Davis v. Great Northern Railway Co. 355.

## LIEN OF ATTORNEY.

See ATTORNEY AND CLIENT, 2; WITNESS, 4.

## ENFORCEMENT OF LIEN.

7. By section 4955, G. S. 1913, an attorney is given a lien for his compensation upon the cause of action from the time of the service of the summons in the action. Where the action is settled by the parties before trial without notice to or consent of the attorney, the attorney may elect to proceed for the enforcement of his lien rights by an independent action against the defendant, or by intervention proceedings in the original action.

—Davis v. Great Northern Railway Co. 354.

8. The pendency of a former action for the same cause, brought by other attorneys, and which was not pleaded in defense to the second action, and of which the attorneys in the second action had no notice, held not a bar to the lien rights of the attorneys in the second action.

—Davis v. Great Northern Railway Co. 355.

## LIEN INCLUDES EXPENDITURES.

9. The lien given by the statute covers legitimate expenditures by the attorneys in the prosecution of the action, when included within the contract of employment, and it is not limited to such items of costs or disbursements as might be taxed as such against the defendant.

—Davis v. Great Northern Railway Co. 355.

**AUTOMOBILE.** See CONTRACT, 2; EVIDENCE, 11; MUNICIPAL CORPORATION, 1; NEGLIGENCE, 4.

VIOLATION OF G. S. 1913, §§ 2632, 2634.

See HIGHWAY, 1-4.

## TESTIMONY OF EXPERT.

Action upon an accident policy. The insured was killed by his automobile going over an embankment at a turn in the road. The court did not

**AUTOMOBILE—Continued.**

err in permitting an automobile expert to testify that there was a "blow out" in the left front tire and the effect of such "blow out" would be to cause the car to move toward the side of the disabled tire, where the purpose of the testimony was to account for the fact of the car going over the embankment and it had a tendency to meet the theory of plaintiff that the machine left the road because the insured was intoxicated.

—*Thompson v. Bankers Mutual Casualty Insurance Co.* 477.

**BAILMENT.****CONVERSION OF PROPERTY BY BAILEE.**

Neglect of a bailee to notify the bailor of the sale of the premises where a gratuitous bailment is kept, is not a conversion, where no loss or misappropriation follows; nor is the advertising of goods for sale through mistake a conversion so long as there is no sale or loss or misappropriation; nor is the sale of a few articles which have in some manner become commingled with the bailor's goods a conversion of the whole stock, in the absence of evidence as to how the commingling took place.

—*Brandenburg v. Northwestern Jobbers Credit Bureau*, 412.

**BANK AND BANKING. See ASSIGNMENT, 1; GARNISHMENT.****ADMISSION OF BANK OFFICER.**

See EVIDENCE, 7.

**DRAWING DRAFT.**

See CRIMINAL LAW, 10.

**BILLS AND NOTES. See ALTERATION OF INSTRUMENT; EVIDENCE, 9; USURY.****TRANSFER BY DELIVERY.**

Plaintiff, without the knowledge of defendant and before their delivery, undersigned notes made by the latter to another in part payment of the purchase price of goods to give them additional credit. Prior to maturity plaintiff paid money or its equivalent for them. *Held*: Upon payment the collecting agent of the payee was authorized to deliver the notes to plaintiff; that such delivery, though without indorsement, transferred the legal title; and that plaintiff was entitled to recover

**BILLS AND NOTES—Continued.**

of defendant the amount which he paid, subject to such defenses as defendant had against the payee.

—Kiefer v. Tolberg, 519.

**BOND. See EXECUTOR AND ADMINISTRATOR, 1.**

SUPERSEDEAS BOND.

See APPEAL AND ERROR, 6; JUDGMENT, 4.

**BOOKS OF ACCOUNT. See CRIMINAL LAW, 2.****BRIDGE. See CONTRACT, 9; ENGINEER; MASTER AND SERVANT, 6.****ABSENCE OF GUARD RAIL.**

1. The evidence justified a finding of the jury that the defendant was negligent in failing to provide a guard rail of sufficient height on a bridge which it maintained.

—Klaseus v. Village of Kasota, 47.

2. The question of proximate cause was for the jury.

—Klaseus v. Village of Kasota, 47.

**BROKER.****REAL ESTATE BROKER.**

1. Authority given a broker to sell land for a specified sum does not give him authority to sell the land at a higher price and retain the difference. The excess price would belong to the owner in the absence of an agreement.

—Sperry Realty Co. v. Merriam Realty Co. 220.

**ACTION FOR COMPENSATION.**

2. Defendant owned land and gave to plaintiff, a real estate agent, the privilege of making a sale thereof to a certain named person at a named price within a time specified. Plaintiff within the time specified contracted with the person named to sell the land to him at a price in excess of that named. The purchaser refused to complete the sale because of an easement that incumbered the land. It is held: Conceding, but not deciding, that plaintiff performed the terms of its agreement with defendant, and that the failure to consummate the sale was the fault of defendant, plaintiff is not entitled to recover the difference between the price specified and that named in the contract with the pur-

**BROKER—Continued.**

chaser. There being no pleading or proof as to the value of plaintiff's services, it is not entitled to recover in this action.

—Sperry Realty Co. v. Merriam Realty Co. 217.

**CARRIER.****TRANSPORTATION OF GOODS—WHEN IMPROPERLY PACKED.**

1. A common carrier is, at common law, an insurer of the goods shipped, and is responsible for all losses, except those arising from certain excepted causes. One excepted cause is improper packing by the shipper. The rules applicable to contributory negligence do not apply to such a case. The carrier must, to relieve himself from liability, show that the fault of the shipper was the sole cause of the loss.

—Northwestern Marble & Tile Co. v. Williams, 514.

2. If improper packing is apparent to the carrier or his servants, then the carrier may refuse to receive the shipment. If he does receive the shipment, he assumes to carry the goods as they are, and the full common-law liability as carrier attaches.

—Northwestern Marble & Tile Co. v. Williams, 514.

3. Although the carrier has knowledge of the defective packing, yet if it is not apparent to the ordinary observation of the carrier or his servants that the goods cannot be safely carried in the condition in which they are presented, the carrier should not be held to take the chances of injury from improper packing. On this point the evidence in this case presents a question for the jury.

—Northwestern Marble & Tile Co. v. Williams, 514.

**BILL OF LADING—WAIVER OF NOTICE OF LOSS.**

4. The bill of lading under which certain merchandise was shipped by plaintiff over defendant's road provided that claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Part of the merchandise was lost while in possession of the carrier. It is *held*:
  - (1) The evidence conclusively showed that defendant waived strict compliance with this provision of the bill of lading.
  - (2) There was no prejudicial error in the admission of evidence or in the charge.

—Shama v. Chicago, Milwaukee & St. Paul Railway Co. 522.

**CARRIER—Continued.****TRANSPORTATION OF PASSENGER ON FREIGHT TRAIN.**

5. A railway company which receives passengers for transportation on freight trains must afford them a reasonable opportunity to enter and leave such trains in safety, and owes them the duty to guard against dangers which reasonable prudence could foresee and avoid.

—Doran v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 193.

**VERDICT AGAINST CARRIER AND IN FAVOR OF SERVANT.**

6. Where a suit to recover for personal injuries is brought by a passenger against a railway company and one of its employees, and a verdict is rendered against the company but in favor of the employee, such verdict determines that there was no negligence on the part of the employee which can be imputed to the company; but where the company is charged both with the negligence charged against the employee and with other negligence, such verdict also determines that the company was guilty of such other negligence.

—Doran v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 193.

**EVIDENCE.**

7. It is *held* that the evidence is sufficient to sustain the verdict and that there were no prejudicial errors in the admission thereof.

—Doran v. Chicago, St. Paul, Minneapolis & Omaha Railway Co. 193.

**CONSTRUCTION OF AMBIGUOUS STATUTE.**

8. Laws 1913, p. 775, c. 536 (G. S. 1913, §§ 4286, 4287), provides that no railroad company shall charge for transporting any passenger any sum in excess of the following prices, *viz.*: For a distance not exceeding five miles, three cents per mile; for all other distances, two cents per mile. Construing this act it is *held*: The language of the act is ambiguous. It is uncertain whether the legislature intended to authorize a railroad company, when the distance exceeds five miles, to charge three cents per mile for the first five miles and two cents per mile for the additional distance, or only to charge two cents per mile for the entire distance. The act is therefore open to construction.

—State ex rel. v. Chicago, Milwaukee & St. Paul Railway Co. 25.

9. Considering the probable object of the legislature in granting the three-cent rate, the absurd results of the last named construction, the fact that such construction would necessitate holding that prior inconsistent statutes had been repealed by implication, or that putting in effect the rate permitted would necessarily involve violations of such prior statutes, the act is construed to mean that a railroad company is per-

**CARRIER—Continued.**

mitted to charge three cents per mile for the first five miles of a passenger's trip, and two cents per mile for the additional distance.

—*State ex rel. v. Chicago, Milwaukee & St. Paul Railway Co.* 25.

10. There has been no practical construction of the act that should influence our construction thereof.

—*State ex rel. v. Chicago, Milwaukee & St. Paul Railway Co.* 25.

**CASES (MINNESOTA) DISTINGUISHED.**

*Bennett v. Harrison*, 115 Minn. 342, 132 N. W. 309.

—*Tenvoorde v. Tenvoorde*, 128.

*Blom v. Yellowstone Park Assn.* 86 Minn. 237, 90 N. W. 397.

—*Graseth v. Northwestern Knitting Co.* 248, 249.

*Brown v. Hoag*, 35 Minn. 373, 29 N. W. 135.

—*Hanson v. Marion*, 472.

*Chadbourne v. Reed*, 83 Minn. 447, 86 N. W. 415.

—*Ewert v. Minneapolis & St. Louis Railroad Co.* 78.

*Faunce v. Searles*, 122 Minn. 343, 142 N. W. 816.

—*Victor Talking Machine Co. v. Lucker*, 177.

*Graham v. Savage*, 110 Minn. 510, 126 N. W. 394.

—*S. F. Bowser & Co. v. Fountain*, 200.

*Huber v. Johnson*, 68 Minn. 74, 70 N. W. 806.

—*Johnson v. Great Northern Railway Co.* 370.

*Jensen v. Regan*, 92 Minn. 323, 99 N. W. 1126.

—*Graseth v. Northwestern Knitting Co.* 248, 249.

*Liljengren F. & L. Co. v. Mead*, 42 Minn. 420, 424, 44 N. W. 306, 308.

—*S. F. Bowser & Co. v. Fountain*, 200.

*Marple v. Minneapolis & St. L. R. Co.* 115 Minn. 262, 132 N. W. 333.

—*Carlson v. Elwell*, 445.

*Pabst Brewing Co. v. Jensen*, 68 Minn. 293, 294, 71 N. W. 384.

—*Lamont v. Lamont*, 528.

*Petterson v. Butler Bros.* 123 Minn. 516, 144 N. W. 407.

—*Carlson v. Elwell*, 447.

*St. Barnabas Hospital v. Minneapolis Int. Ele. Co.* 68 Minn. 254, 70 N. W. 1126.

—*Victor Talking Machine Co. v. Lucker*, 176.

*Schus v. Powers-Simpson Co.* 85 Minn. 447, 89 N. W. 68.

—*Carlson v. Elwell*, 445.

*Smith v. Barnes*, 38 Minn. 240, 36 N. W. 346.

—*Lamoreaux v. Andersch*, 267.

*State v. Nelson*, 91 Minn. 143, 97 N. W. 652.

—*State v. McLarne*, 168.

## CASES (MINNESOTA) DISTINGUISHED—Continued.

- Stub v. Grimes, 38 Minn. 317, 37 N. W. 444.  
—Wilkes v. Holmes, 353.  
Sundvall v. Interstate Iron Co. 104 Minn. 499, 116 N. W. 1118.  
—Carlson v. Elwell, 445.  
Thomas Mfg. Co. v. Knapp, 101 Minn. 432, 112 N. W. 989.  
—Victor Talking Machine Co. v. Lucker, 174, 175.  
Virtue v. Creamery Package Mfg. Co. 123 Minn. 17, 142 N. W. 930, 1136.  
—Victor Talking Machine Co. v. Lucker, 178.  
Waters v. Pioneer Fuel Co. 52 Minn. 474, 55 N. W. 52.  
—Winters v. American Radiator Co. 509.

## CASES (MINNESOTA) FOLLOWED.

- Banks v. Pennsylvania R. Co. 111 Minn. 48, 126 N. W. 410.  
—Shama v. Chicago, Milwaukee & St. Paul Railway Co. 524.  
Bell v. Lang, 83 Minn. 228, 86 N. W. 95.  
—Berg v. Pittsburgh Construction Co. 410, 411.  
Bergstrom v. Johnson, 111 Minn. 247, 126 N. W. 899.  
—Murphy v. Anderson, 111.  
Blakely v. J. Neils Lumber Co. 121 Minn. 280, 141 N. W. 179.  
—Blakely v. J. Neils Lumber Co. 465.  
Capehart v. Foster, 61 Minn. 132, 63 N. W. 257.  
—Lyons v. Westerdahl, 289, 291.  
Cram v. Thompson, 87 Minn. 172, 91 N. W. 483.  
—Hanson v. Marion, 468, 471.  
Culligan v. Cosmopolitan Co. 126 Minn. 218, 148 N. W. 273.  
—Kipp v. Love, 504.  
Davis v. Great Northern Ry. Co. 128 Minn. 354, 151 N. W. 126.  
—Davis v. Great Northern Railway Co. 536.  
Dickson v. Miller, 124 Minn. 346, 145 N. W. 112.  
—Wortz v. Wortz, 252, 254.  
Dimond v. Manheim, 61 Minn. 178, 63 N. W. 495.  
—Purcell v. Thornton, 259, 260.  
Fisk v. Stewart, 24 Minn. 97.  
—Ten Voorde v. Ten Voorde, 127.  
Gamble-Robinson Commission Co. v. Northern Pacific Ry. Co. 119 Minn. 40, 137 N. W. 19.  
—Shama v. Chicago, Milwaukee & St. Paul Railway Co. 524.  
Grout v. Stewart, 96 Minn. 230, 104 N. W. 966.  
—Ten Voorde v. Ten Voorde, 127.  
Hanson v. Nygaard, 105 Minn. 30, 117 N. W. 235.  
—Bombolis v. Minneapolis & St. Louis Railroad Co. 117.

## CASES (MINNESOTA) FOLLOWED—Continued.

- In re Hess' Estate*, 57 Minn. 282, 59 N. W. 193.  
—*Moe v. Paulson*, 277, 281.  
*Keyes v. Minneapolis & St. L. Ry. Co.* 36 Minn. 290, 30 N. W. 888.  
—*Raski v. Great Northern Railway Co.* 129.  
*Klages v. Gillette-Herzog Mnfg. Co.* 86 Minn. 458, 90 N. W. 1116.  
—*State ex rel. v. District Court of St. Louis County*, 46.  
*Knight v. Norris*, 13 Minn. 438 (473).  
—*Lamoreaux v. Andersch*, 269.  
*McKinnon v. Red River Lumber Co.* 119 Minn. 479, 138 N. W. 781.  
—*Kenny & Anker v. Duluth Log Co.* 6, 10.  
*Mahoney v. Maxfield*, 102 Minn. 377, 113 N. W. 904.  
—*Schaar v. Conforth*, 464.  
*Mathison v. Minneapolis St. Ry. Co.* 126 Minn. 286, 148 N. W. 71.  
—*State ex rel. v. District Court of Meeker County*, 221, 224.  
*Minneapolis Gaslight Co. v. City of Minneapolis*, 123 Minn. 231, 143 N. W. 728.  
—*Twitchell v. Cummings*, 392.  
*Nicholson v. Congdon*, 95 Minn. 188, 103 N. W. 1034.  
—*Kipp v. Love*, 498.  
*Niggeler v. Maurin*, 34 Minn. 118, 24 N. W. 369.  
—*Ten Voorde v. Ten Voorde*, 127.  
*Noodelman v. City of Minneapolis*, 128 Minn. 531, 150 N. W. 398.  
—*Bernstein v. City of Minneapolis*, 532.  
*Rait v. New England F. & C. Co.* 66 Minn. 76, 68 N. W. 729.  
—*State ex rel. v. District Court of St. Louis County*, 46.  
*Renlund v. Commodore Mining Co.* 89 Minn. 41, 93 N. W. 1057.  
—*Bombolis v. Minneapolis & St. Louis Railroad Co.* 118.  
*Rogers v. Clark Iron Co.* 104 Minn. 198, 116 N. W. 739.  
—*Kipp v. Love*, 498.  
*Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386.  
—*Bombolis v. Minneapolis & St. Louis Railroad Co.* 117.  
*Savino v. Griffin Wheel Co.* 118 Minn. 290, 294, 136 N. W. 876.  
—*Peery v. Illinois Central Railroad Co.* 121.  
*Soutar v. Minneapolis Intern. Ele. Co.* 68 Minn. 18, 70 N. W. 796.  
—*Berg v. Pittsburgh Construction Co.* 410, 411.  
*State v. Schueller*, 120 Minn. 26, 138 N. W. 937.  
—*State v. Roby*, 189.  
*Stitt v. Rat Portage Lumber Co.* 94 Minn. 529, 103 N. W. 1133.  
—*Ten Voorde v. Ten Voorde*, 127.  
*Walker v. St. Paul City Ry. Co.* 52 Minn. 127, 53 N. W. 1068.  
—*Brennan v. Keating*, 50.

**CASES (MINNESOTA) FOLLOWED—Continued.**

**Winters v. Minneapolis & St. L. R. Co.** 126 Minn. 260, 148 N. W. 106.

—**Bombolis v. Minneapolis & St. Louis Railroad Co.** 112, 118.

**Young v. Baker,** 128 Minn. 398, 151 N. W. 132.

—**Baker v. Schulz,** 538.

**CASES (MINNESOTA) LIMITED.**

**Morin v. St. Paul, M. & M. Ry. Co.** 33 Minn. 176, 22 N. W. 251.

—**Lamont v. Lamont,** 528.

**Rogers v. Stevenson,** 16 Minn. 56 (68).

—**Hanson v. Marion,** 473.

**CHAMPERTY AND MAINTENANCE. See ATTORNEY AND CLIENT, 1, 3.**

It is not against public policy as champerty or maintenance, for an attorney to solicit business, or to advance money to a poor client for his living expenses during litigation, or to advise a client against the settlement of his case.

—**Johnson v. Great Northern Railway Co.** 365.

**CITY OF DULUTH. See MUNICIPAL CORPORATION, 3; STREET RAILWAY, 1-4.****CITY OF MINNEAPOLIS. See CONTRACT, 9; EMINENT DOMAIN, 18; ENGINEER.****CITY OF ST. PAUL. See ELECTION; EMINENT DOMAIN, 3-8; REGISTRATION OF TITLE, 1, 2.****CLASSIFICATION OF PROPERTY. See TAXATION, 1, 2.****CLASS LEGISLATION. See CONSTITUTION, 1.****COLLATERAL ATTACK. See INSURANCE, 6; JUDGMENT, 2.****COLLATERAL SECURITY. See MORTGAGE, 1.****COMMERCE.****SALE BY FOREIGN CORPORATION.**

1. A foreign corporation, selling goods to purchasers within the state upon orders received from traveling salesmen or by mail, and which ships goods into the state only to fill such orders, is engaged in interstate commerce, and it is not within the prohibitions of G. S. 1913, §§ 6206-6208, relating to foreign corporations doing business in this state. Its transactions are not rendered local by the fact that it advertises its goods in this state, or by the fact that its traveling salesmen turn in

**COMMERCE—Continued.**

orders to local distributors to be filled by them, if the corporation disposes of its goods only by outright sales in the manner above described.

—Victor Talking Machine Co. v. Lucker, 171.

**FEDERAL LIABILITY ACTS.**

2. A car in process of transportation from one state to another is in transit and is being used in interstate commerce while being switched at an intermediate yard with other interstate cars, although there may be a purpose to switch the defective car to a repair track for repair of a defective coupler before it leaves the yard. The Federal Safety Appliance Act and the Employer's Liability Act apply to such a car.

—Otos v. Great Northern Railway Co. 283.

3. Ruling on a former appeal in this case, that it is within the operation of the Federal Employer's Liability Act, adhered to.

—Peery v. Illinois Central Railroad Co. 119.

**COMPETITION. See TRADE MARK AND TRADE NAME.****COMPROMISE AND SETTLEMENT. See ATTORNEY AND CLIENT, 2; CORPORATION, 2; EXECUTOR AND ADMINISTRATOR, 1; INSURANCE, 3; WITNESS, 4.****ACTION TO RESCIND.****OPINION ON QUESTION OF LAW.**

1. Opinions expressed by one contracting party to another upon doubtful questions of law, arising in the course of compromise of a disputed claim, are not actionable representations, even though the person giving the opinion be an attorney at law.

—Valley v. Crookston Lumber Co. 387.

**SAME—ESTOPPEL BY CONDUCT.**

2. A party to a compromise cannot rescind it for fraud, where he knowingly and voluntarily uses and enjoys the fruits of the compromise after being fully advised of the facts. This the plaintiff in this case did, and judgment should be given for defendant.

—Valley v. Crookston Lumber Co. 387.

**EVIDENCE INSUFFICIENT.**

3. Evidence considered, and held not sufficient to warrant submitting to the jury the question whether plaintiff was mentally incompetent, or did not know what he was doing, when he received money paid by the defendant in settlement of his claim for personal injuries and executed a release.

—Carlson v. Elwell, 440.

**CONDITION.** See **EMINENT DOMAIN**, 15; **EVIDENCE**, 10; **STREET RAILWAY**, 1-3.

**CONDITION PRECEDENT.**

See **LOG AND LOGGING**, 3.

**CONDITION SUBSEQUENT.**

See **STREET RAILWAY**, 3.

**CONFESSION.** See **CRIMINAL LAW**, 1.

**CONFLICT OF LAWS.** See **TAXATION**, 12, 13; **USURY**; **WORKMEN'S COMPENSATION ACT**, 3.

**CONSIDERATION.** See **CONTRACT**, 8; **CORPORATION**, 24; **EVIDENCE**, 8; **FRAUDS (STATUTE OF)**, 1; **VENDOR AND PURCHASER**, 1.

The issuance and delivery of a policy of life insurance is a sufficient consideration for a note previously given for the first premium on such a policy.

—Wadsworth v. Walsh, 241.

**CONSTITUTION.** See **ELECTION**.

**CLASSIFICATION OF PROPERTY.**

See **TAXATION**, 2.

**EQUAL PROTECTION OF THE LAW.**

See **STATUTE**, 2.

**OBLIGATION OF CONTRACT.**

See **CONSTITUTION**, 3; **STATUTE**, 2.

**TAKING OF PRIVATE PROPERTY.**

See **EMINENT DOMAIN**, 7, 8.

**TITLE OF ACT.**

See **STATUTE**, 1, 2.

**CLASS LEGISLATION.**

1. Section 2634, G. S. 1913, fixing the limit of speed in passing at four miles an hour, is not unconstitutional as class legislation. It is a police regulation.

—Schaar v. Conforth, 461, 465.

**WORKMEN'S COMPENSATION ACT.**

2. Held, following Mathison v. Minneapolis Street Ry. Co. 126 Minn. 286, 148 N. W. 71, that the Workmen's Compensation Act is not obnoxious to the various constitutional provisions invoked by defendant.

—State ex rel. v. District Court of Meeker County, 221.

**CONSTITUTION—Continued.**

3. The statute applies to the relation of employer and employee existing at the time of and which continued after its passage; and does not impair the obligations of the contract by which the relation came into existence.  
—State ex rel. v. District Court of Meeker County, 221.

**CONTEMPT.****CRIMINAL CONTEMPT.**

1. A proceeding in criminal contempt is one instituted for the sole purpose of penalizing the defendant. Its purpose being public, an order punishing a person for criminal contempt does not fall on account of irregularity of the order disobeyed, unless the court was without jurisdiction to make it.  
—Red River Potato Growers Assn. v. Bernardy, 154.
2. Orders imposing simple fines for contempt of court in violating an injunction, where the forbidden acts have been wholly performed and cannot be recalled, are orders in criminal contempt.  
—Red River Potato Growers Assn. v. Bernardy, 154.

**CIVIL CONTEMPT.**

3. A proceeding in civil contempt is one instituted in a civil action for the benefit of a party to the action, and where punishment is imposed it is remedial, and is imposed for the benefit of the party and to aid in the enforcement of his rights. The contempt proceeding being in aid of the enforcement of the order disobeyed, it falls with the annulment of that order.  
—Red River Potato Growers Assn. v. Bernardy, 154.
4. From an order imposing punishment for civil contempt there is a right of appeal. From an order imposing punishment for criminal contempt there is no right of appeal.  
—Red River Potato Growers Assn. v. Bernardy, 154.
5. Orders in this case imposing fines to be paid to the plaintiff were orders in civil contempt, and since the order disobeyed was reversed on appeal the orders imposing the fines must also be reversed.  
—Red River Potato Growers Assn. v. Bernardy, 154.

**CONTRACT.** See CORPORATION, 2, 5; PLEADING, 4; REGISTRATION OF TITLE, 1; WORK AND LABOR, 1.

**VOID FOR INDEFINITENESS.**

See EXCHANGE OF PROPERTY, 1.

**OFFER AND ACCEPTANCE**

See SALE, 1.

**CONTRACT—Continued.****ACCEPTANCE BY BUYER.**

See **SALE**, 3.

**MUTUALITY OF AGREEMENTS.**

See **CORPORATION**, 4.

**EXPRESS CONTRACT.**

See **MASTER AND SERVANT**, 3.

1. An express contract may be inferred from the acts of the parties as well from their spoken words.

—*Dybvig v. Minneapolis Sanatorium*, 294.

**CONTRACT IN WRITING—SIGNATURES OF PARTIES.**

2. A written contract, made in duplicate, purporting to transfer an automobile from plaintiffs in consideration of a transfer by defendant to plaintiffs of certain shares of corporate stock, was not signed by one of the plaintiffs, although he was named in the body of the contract; but the other plaintiff and defendant signed the duplicates and retained one each. Thereafter the automobile was delivered to defendant by the plaintiff who had not signed. *Held*, in this, an action of replevin, that the mere lack of the signature of one of the plaintiffs is not sufficient proof of an understanding or agreement that the contract was not to take effect until signed by both plaintiffs.

—*Wilkes v. Holmes*, 349.

**BETWEEN ATTORNEY AND CLIENT.**

See **ATTORNEY AND CLIENT**, 1-4.

3. An agreement between attorney and client, by which the former is to advance money for expenses and is permitted to deduct the amount thereof from the amount recovered, is not against public policy, where it does not appear that it was agreed that the client should not be liable for the expenses in case there was no recovery.

—*Johnson v. Great Northern Railway Co.* 365.

**BETWEEN COTENANTS.**

See **PARTITION**, 3, 4.

**CONSTRUCTION OF CONTRACT OF EMPLOYMENT.**

See **ATTORNEY AND CLIENT**, 1.

**CONSTRUCTION OF AMBIGUITY BY CONDUCT.**

4. An ambiguous part in a written contract may, by subsequent acts of the parties with reference thereto, be rendered certain. In such case, where

**CONTRACT—Continued.**

the subsequent acts are in dispute, it is not improper to leave the interpretation of the ambiguous provision to the jury, although, as a general rule, the construction of a written contract is for the court.

—Klemik v. Henricksen Jewelry Co. 490.

5. Plaintiff is entitled to receive his share of the proceeds of each tract upon consummation of the sale of such tract, less any deductions accrued at that time.

—Barnum v. White, 58.

6. Plaintiff deeded certain lots to one of defendants. By contract between the parties, defendants agreed to take necessary action to convert the lots into cash, to conduct all necessary suits, to pay all cost and expense thereof, and when the same or any part thereof should be sold, to divide the proceeds. The contract also provided that defendants should advance and pay plaintiff certain amounts and that "all sums advanced and paid" thereunder should be deducted from plaintiff's share. *Held*, the amount paid by defendants for cost and expense of litigation cannot be deducted from plaintiff's share.

—Barnum v. White, 58.

7. The provision in the contract for division of the "proceeds" of sales does not require that there be deducted from plaintiff's share any expense which the contract by its other terms required defendants to pay.

—Barnum v. White, 59.

**RATIFICATION.**

See COMPROMISE AND SETTLEMENT, 2.

**PERFORMANCE OF CONTRACT.**

See CONTRACT, 9; ENGINEER; MECHANIC'S LIEN, 3.

**ACTION FOR BREACH.**

See SPECIFIC PERFORMANCE, 3.

8. When one transaction or agreement constitutes an inducement or part consideration for another deal or contract, it is not objectionable, in bringing suit upon the latter, to plead the pertinent matters of the former. In this case the court committed no error in refusing to strike matters of inducement from the complaint or in refusing to compel an election.

—Klemik v. Henricksen Jewelry Co. 490.

9. Action to recover for breach of contract to pay for plaintiff's services as engineer in the construction of bridges. Defense that plaintiff failed to perform his contract in not securing proper driving of piles for one bridge. *Held*: The evidence was sufficient to sustain the findings of the trial court in favor of plaintiff. The question whether plaintiff was

**CONTRACT—Continued.**

derelict in failing to discover that the piles had not been properly driven was a question of fact for the trial court.

—Cowles v. City of Minneapolis, 452.

**SAME—COUNTERCLAIM AS DEFENSE.**

10. If defendants have any offset, it is for them to plead and prove it. It is not necessary for plaintiff to prosecute an equitable accounting to ascertain whether defendants have such offset.

—Barnum v. White, 58.

**RIGHT TO BE REIMBURSED FOR TAXES.**

11. There is evidence that defendants paid some taxes on these lots. The contract did not require defendants to pay taxes, but, since there is no evidence as to the amount of taxes paid or as to the circumstances of their payment, the court cannot further determine the rights of the parties with reference thereto.

—Barnum v. White, 59.

**CORPORATION. See CRIMINAL LAW, 2.****PUBLIC SERVICE CORPORATION.**

See EMINENT DOMAIN, 2.

**PROCEEDINGS OF BOARD OF DIRECTORS.**

See EVIDENCE, 3.

**ADMISSION BY CORPORATE OFFICER.**

See EVIDENCE, 7.

**REMOVAL OF CAUSE BY FOREIGN CORPORATION.**

See REMOVAL OF CAUSE, 2.

**AUTHORITY TO FILE PETITION IN CONDEMNATION PROCEEDINGS.**

See EMINENT DOMAIN, 12.

**FRANCHISE.**

1. A corporation was incorporated October 17, 1881, under the general laws and its corporate existence fixed for 50 years. By an amendment in 1910, its corporate life was extended for 50 years from July 1, 1908. A grant to the company of an exclusive franchise "during the term of its charter" expired October 17, 1931. The amendment did not result in an extension of the franchise.

—State ex rel. v. Duluth Street Railway Co 317. 321.

## CORPORATION—Continued.

## AGREEMENT TO REPURCHASE STOCK.

See ASSIGNMENT, 2; SPECIFIC PERFORMANCE, 1.

2. Finding that a written agreement, unilateral in form, to repurchase from plaintiff's assignor certain shares of stock assigned to him in the course of, and pursuant to, a general settlement between him, defendant, and its president, was a part of such settlement, and hence supported by valid consideration, *held* sustained by the evidence.

—First National Bank of Hastings v. Corporation Securities Co. 341.

3. Plaintiff, to which the stock was also assigned, being authorized by the assignment to enforce the agreement, and to deliver it and the stock to defendant upon payment of the specified price, and to receive and receipt for the latter, had the right to continue the prosecution of its action to enforce the agreement, though the debt to secure which the assignment was made was paid after the action was brought.

—First National Bank of Hastings v. Corporation Securities Co. 342.

4. The agreement to repurchase, being supported by the considerations involved in the general settlement, did not lack mutuality of obligation; nor was it wanting in mutuality of assent of parties.

—First National Bank of Hastings v. Corporation Securities Co. 342.

## UNCERTAIN VALUE OF STOCK.

See SPECIFIC PERFORMANCE, 4.

## EMPLOYMENT OF ATTORNEY.

See ATTORNEY AND CLIENT, 5.

## IMPLIED POWER OF PRESIDENT TO RETAIN ATTORNEY.

5. A president of a corporation ordinarily has implied power to retain an attorney to defend an action brought against the corporation, especially when the attorney so retained has acted as such for the corporation in prior matters.

—Traxler v. Minneapolis Cedar & Lumber Co. 295.

## EFFECT OF PRESIDENT'S SIGNATURE.

6. The evidence warranted a finding that the agreement was defendant's undertaking, notwithstanding the character of its president's signature thereto.

—First National Bank of Hastings v. Corporation Securities Co. 341.

## ISSUE OF INCORPORATION.

7. Where the creation of a corporation is not a material issue in a cause of action, it need not be proven even if alleged. Where material and

**CORPORATION—Continued.**

alleged, neither a denial on information and belief nor a general denial is sufficient to raise the issue of incorporation.

—Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co. 73.

**FOREIGN CORPORATION DOING BUSINESS IN MINNESOTA.**

See **COMMERCE**, 1.

8. A foreign corporation which has sold goods to purchasers within the state upon orders received from traveling salesmen or by mail, and ships goods into the state only to fill such orders, does not lose its right to enforce its interstate contracts in our courts by subsequently engaging in local business without complying with our laws.

—Victor Talking Machine Co. v. Lucker, 171.

**COSTS.** See **ADVERSE CLAIM**, 2; **APPEAL AND ERROR**, 5; **ATTORNEY AND CLIENT**, 9; **JUDGMENT**, 4; **PARTITION**, 5.

1. Where it is unnecessary on appeal to print the entire record in order to present the questions raised on appeal, taxation of disbursement for that item will be cut down to the proper amount.

—Raski v. Great Northern Railway Co. 130.

2. Costs in an action to determine whether plaintiff had the right to enforce a partition of real estate are not expenses of making the partition, within the meaning of G. S. 1913, § 8037. Hence, a motion to vacate the levy of an execution upon a judgment for costs in such action must be denied.

—Hunt v. Meeker County Abstract & Loan Co. 539.

**COURT (DISTRICT).****INTERFERENCE OF COURT WITH TRUSTEE.**

See **TRUST**, 2, 3.

**JURISDICTION.**

See **APPEAL AND ERROR**, 6; **DRAIN**, 1; **EMINENT DOMAIN**, 15; **JUDGMENT**, 4.

**COURT (FEDERAL).** See **REMOVAL OF CAUSE**, 1.

**COURT (MUNICIPAL).**

Actions in municipal courts are within the purview of G. S. 1913, § 7721, defining the county residence of railroad companies for the purpose of actions against them; and, where the venue in such an action is properly laid thereunder, the defendant has no right under section 272 to change it to another municipal court in the same county, though the

**COURT (MUNICIPAL)—Continued.**

latter is nearer its principal general office in the state and its principal place of business in the county.

—State ex rel. v. Municipal Court of City of Duluth, 225.

**COURT (PROBATE). See PLEADING, 2.****JURISDICTION.**

See **EXECUTOR AND ADMINISTRATOR, 1, 2; JUDGMENT, 2.**

**DISCHARGE OF ADMINISTRATOR.**

See **EXECUTOR AND ADMINISTRATOR, 3.**

**CRIMINAL LAW. See CONTEMPT, 1, 2; WITNESS, 5.****CONFESSION.**

1. Our statute provides that a confession of defendant shall not be sufficient to warrant his conviction, without evidence that the offense charged has been committed.

—State v. McLarne, 163.

**EVIDENCE OF OTHER OFFENSES.**

See **CRIMINAL LAW, 12.**

**EVIDENCE—BOOKS OF ACCOUNT OF FOREIGN CORPORATION.**

2. The books and records of a large mercantile establishment, situated outside the state, when properly identified as the books and records kept in the usual course of business, may be received in evidence in a criminal trial without being verified by the clerks who actually made the entries. It is for the trial court to determine whether sufficient foundation for the introduction of such books has been laid, and the ruling will not be reversed unless abuse of judicial discretion is made to appear.

—State v. Virgens, 422.

**OPINION EVIDENCE.**

3. A witness who has observed the appearance and manner of speech of a person may therefrom be permitted to testify to the opinion formed concerning the mental state of such person.

—State v. Virgens, 422.

**MISCONDUCT OF PROSECUTOR.**

4. Certain conduct of the court and of the county attorney reviewed and held to be not improper.

—State v. Roby, 187.

## CRIMINAL LAW—Continued.

## WITNESS—CALLING DEFENDANT'S WIFE TO WITNESS STAND.

5. The county attorney called the wife of defendant as a witness for the state. Defendant claimed his statutory privilege and excluded her testimony. *Held*, the action of the county attorney in calling the wife was not misconduct, though defendant, before he was indicted, had notified the county attorney that he would object to the evidence of his wife either before the grand jury or elsewhere or otherwise.

—State v. Roby, 187.

## CROSS-EXAMINATION.

6. Defendant on trial for murder, by the cross-examination of the state's witnesses, insinuated that a witness and defendant's wife desired conviction; and when defendant took the stand he accused them of criminal intimacy. In this situation, it was proper cross-examination of defendant to elicit that he claimed that, at the time of the commission of the crime, his wife was with him at home, and no impropriety in asking him in view of his accusation if he would consent to the wife testifying.

—State v. Virgens, 423.

## ARGUMENT OF COUNTY ATTORNEY.

7. It was not misconduct of the county attorney, in his opening address, to state what he expected to prove, and which he did prove without objection. Nor was it prejudicial misconduct of such attorney, in his closing address, to allude to the desire of the state to have had defendant's wife as a witness under the circumstances of this case. An improper reference to the change of venue was rendered harmless by the court's instruction not to consider it.

—State v. Virgens, 423.

## CHARGE TO JURY.

8. The court's charge was correct, and the evidence, though circumstantial, sustains the conviction.

—State v. Virgens, 423.

## ARSON.

9. The *corpus delicti* in arson, the crime of which defendant was convicted, requires proof, not alone of the fact that the building burned, but also that the fire originated through criminal agency. Excluding the claimed admissions or confessions of defendant, the evidence is insufficient to prove that the crime of arson was committed.

—State v. McLarne, 164, 168.

## CRIMINAL LAW—Continued.

## LARCENY.

10. When an indictment alleges grand larceny in the first degree committed by obtaining "current and genuine money" by fraudulent representations, and the evidence shows that the one defrauded drew a draft on a Missouri bank in favor of a Minnesota bank, and the latter bank honored it and was ready to pay the money to the defendant and he requested two drafts and a deposit credit, there is no fatal variance.  
—State v. Cary, 481.
11. The evidence is insufficient to sustain a conviction of obtaining money by false representations as to the ownership of property with intent to cheat and defraud.  
—State v. Cary, 481.

## RAPE.

12. In a prosecution for the crime of carnal knowledge of a female child under 14, alleged to have been committed May 20, evidence of a second offense committed upon the person of the same child on June 2 is admissible. Where the county attorney at the close of the state's case expressly elected to proceed to judgment upon the first charge, it is unimportant whether or not the method of proof followed by the state constituted an implied election to so proceed.  
—State v. Roby, 187.
13. Where two offenses of this character are proven, it is not error for the court to refuse to require the state to elect upon which charge it will proceed until the close of the state's case.  
—State v. Roby, 187.

## ROBBERY.

14. In a prosecution for robbery, the evidence is *held* sufficient to support the verdict of guilty, and that there was no abuse of discretion in denying a new trial on the ground of newly discovered evidence.  
—State v. Flockey, 40.

## CROP. See ASSIGNMENT, 1; NEW TRIAL, 5; VENDOR AND PURCHASER, 3.

1. As between the assignee and the assignor of a cropping contract, the assignment passes the benefits subject to the burdens, and unless he has so stipulated he cannot require the assignor to continue to bear the burdens of the contract while he enjoys the benefits.  
—Pioneer Loan & Land Co. v. Cowden, 310.
2. The amount to be paid for plowing and breaking under the terms of a cropping contract or lease was in reality a deduction from the gross

**CROP—Continued.**

return the landowner was to receive from his land. On principle it cannot be distinguished from the amount to be paid for threshing. One was for producing the crop, the other for garnering it in, but the principle in each case was the same.

—Pioneer Loan & Land Co. v. Cowden, 309.

**CUSTOM. See MASTER AND SERVANT, 7, 13, 23.**

1. Neither custom nor usage can justify a negligent act.

—Stash v. Great Northern Railway, 331.

—Watson v. City of Duluth, 448.

2. A custom of business houses to take at least ten days to investigate the credit of a new customer could not bind the defendants in the absence of proof that they had knowledge of the custom, or that it had become so general, long established and notorious that they must be presumed to have knowledge of it.

—S. F. Bowser & Co. v. Fountain, 198.

**DAMAGES. See APPEAL AND ERROR, 23; EMINENT DOMAIN, 4-6, 11; SALE, 4-6.****RIGHT TO DAMAGES.**

See SALE, 2.

**INADEQUATE DAMAGES GROUND FOR NEW TRIAL.**

See EMINENT DOMAIN, 17.

**APPEAL FROM AWARD.**

See EMINENT DOMAIN, 13, 14.

**PAYMENT.**

See EMINENT DOMAIN, 16.

**IN ACTION FOR PERSONAL INJURY—NOT EXCESSIVE.**

1. Action for injuries inflicted by a vicious cow. Verdict for \$2,250, reduced to \$1,500. *Held*: The damages, as reduced, are not excessive.  
—Engbretson v. Bremer, 232, 235.
2. Action for personal injuries. Verdict for \$5,000, reduced by the trial court to \$3,500. *Held* the verdict, as reduced, is not so excessive as to warrant interference by this court.  
—Kommerstad v. Great Northern Railway Co. 505.
3. Plaintiff was an electrician, 36 years old, earning from \$110 to \$130 a month. *Held*: Verdict for \$6,000 as damages resulting from the fracture of plaintiff's leg and other injuries sustained.  
—Daly v. Curry, 449.

## DAMAGES—Continued.

4. Plaintiff was a strong, healthy laborer of 24 when he was injured. His earning capacity was not shown. The knee joint was permanently stiffened. Verdict for \$7,000, reduced by the trial court to \$6,000, sustained as reduced.

—*Stash v. Great Northern Railway Co.* 329, 331.

5. Verdict of \$9,000, reduced by the trial court from \$12,000, *held* not excessive, in an action by a railroad conductor 38 years old and earning \$125 per month, who had been idle more than two years, for damages sustained through the negligence of defendant resulting in a permanent stooped position.

—*Peery v. Illinois Central Railroad Co.* 119.

6. Verdict for \$11,000. Plaintiff sustained a compound fracture of the right thigh and the leg was shortened 2½ inches. His suffering was intense and he will never be able to do any heavy work. His earnings were \$60 to \$90 per month varying with the seasons. *Held*: The damages are not excessive.

—*Arveson v. Boston Coal Dock & Wharf Co.* 179, 186.

7. Verdict for \$12,000, for injuries to a 17 year old girl's right hand and forearm, which not only disfigured, but rendered them practically useless, sustained.

—*Graseth v. Northwestern Knitting Co.* 245.

8. Verdict for \$35,000. Reduction by trial court to \$30,000. Plaintiff was 26 years old and had been earning about \$110 a month. His left leg was amputated within two inches of the hip joint, making the use of an artificial leg impossible. Nerve tumors formed on the stump. *Held*: The damages as reduced by the trial court are not excessive. Defendant was not entitled to a reduction of the amount of plaintiff's damages because of a prospect that a surgical operation might relieve part of his injury.

—*Otos v. Great Northern Railway Co.* 283, 286.

## DAMAGES EXCESSIVE.

9. Verdict for \$9,850. Plaintiff was 49 years old, earning 25 cents per hour. His leg was shortened about an inch and his shoulder was fractured. *Held*: The damages awarded are considered excessive and the verdict was reduced to \$7,000.

—*Quinn v. St. Paul Boiler & Manufacturing Co.* 271, 276.

10. In this a personal injury action, where the evidence shows an injury to the spinal cord which has permanently crippled plaintiff, virtually destroyed all earning capacity, and so paralyzed him that he is unable to attend to his wants without assistance, it is *held* that, although the injuries

**DAMAGES—Continued.**

are so severe, the verdict of \$35,000 is excessive, and should be reduced to \$30,000.

—Padrick v. Great Northern Railway Co. 228.

**IN ACTION FOR INJURY TO ANIMAL.**

11. Keyes v. Minneapolis & St. L. Ry. Co. 36 Minn. 290, 30 N. W. 888, to the effect that for the wrongful injury to an animal, the injury being such as may be cured by treatment, the owner is entitled to recover the diminished value of the animal after cure, so far as effected, the expense of treatment, and the value of the use of the animal while under treatment, followed and applied.

—Raski v. Great Northern Railway Co. 129.

12. Where the owner of the animal is given the difference in value before and immediately after the injury, he is not entitled to the expense of treatment administered in efforts to cure the injury.

—Raski v. Great Northern Railway Co. 129.

**DANGEROUS MACHINERY.** See EVIDENCE, 12; MASTER AND SERVANT, 27; NEW TRIAL, 3.

**DEATH.** See DEED, 2.

1. Nonresident aliens are entitled to the benefits of the Federal Employer's Liability Act.

—Bombolis v. Minneapolis & St. Louis Railroad Co. 112.

2. Plaintiff's intestate was a common laborer, 23 years old when killed. He had remained with and assisted his parents until a few months previous to his death. Out of his first month's wages he sent \$10 to his father because of the latter's need. The parents worked on a farm but did not own it. In this action under the Federal Employer's Liability Act, it is *held*, that there was not such a failure of proof of pecuniary loss to the parents that defendant was entitled to either judgment notwithstanding the \$2,000 verdict, or a new trial.

—Lundeen v. Great Northern Railway Co. 332.

**DEATH BY WRONGFUL ACT.** See NEGLIGENCE, 1.

**DEED.** See APPEAL AND ERROR, 19; EMINENT DOMAIN, 11; TRUST, 1, 2, 4.

**UNDUE INFLUENCE.**

1. The evidence is sufficient to sustain the finding that a certain deed was procured by undue influence.

—Wortz v. Wortz, 252.

**DELIVERY.**

2. A deed deposited with a third party for delivery to the grantee after the

**DEED**—Continued.

death of the grantor, but which the grantor reserves the right to recall at any time, conveys no title because no valid delivery has been made. *Dickson v. Miller*, 124 Minn. 346, 145 N. W. 112, followed and applied.

—*Wortz v. Wortz*, 251.

3. The finding that appellant's deed was delivered to the grantee named in it, is not supported by evidence that the deed was placed with the cashier of a bank to be delivered to the grantee named in, case he delivered a satisfaction of judgment against the grantor's husband (which he did not do); that he refused to accept the deed, and it was afterward returned to appellant's husband and destroyed.

—*Ziemon v. Diessner*, 535.

**DELIVERY.****OF DEED.**

See **DEED**, 2, 3.

**OF GOODS.**

See **MASTER AND SERVANT**, 31.

**DEMAND.** See **LOG AND LOGGING**, 3, 5; **TROVER AND CONVERSION**, 2.

**FINDINGS OF COURT TO SHOW ABSENCE OF DEMAND.**

See **LOG AND LOGGING**, 4.

**DEPOSITION.****WHEN MOTION TO SUPPRESS SHOULD BE MADE.**

Conceding that the refusal of a witness to answer material questions asked on cross-examination is ground for suppressing the deposition of such witness, the motion to suppress must be made within 10 days after notice of the return of the deposition, as provided by G. S. 1913, § 8393.

—*Lamont v. Lamont*, 525.

**DESCRIPTION.** See **EMINENT DOMAIN**, 9, 11.

**DISBURSEMENT.** See **APPEAL AND ERROR**, 5.

**DISCRETION OF COURT.** See **APPEAL AND ERROR**, 7, 14; **CRIMINAL LAW**, 2, 14; **EVIDENCE**, 12; **INCOMPETENT**, 3; **JUDGMENT**, 1; **TRIAL**, 2, 4, 10.

**DISMISSAL AND NONSUIT.** See **APPEAL AND ERROR**, 9.

1. Demurrer held properly sustained to the specific defense, based primarily on G. S. 1913, § 7825, of two prior dismissals, without defendant's consent, of actions against him upon the same cause of action herein involved.

—*Brennan v. Keating*, 49.

**DISMISSAL AND NONSUIT—Continued.**

2. Section 7825 has no reference to dismissals of actions in another state.  
—Brennan v. Keating, 50, 51.

**DRAIN. See WATER AND WATERCOURSE, 1, 2.****PROPRIETY OF ORDER OF BOARD.**

1. In a county ditch proceeding the question of the propriety of diverting the waters of a meandered lake may be determined upon appeal to the district court; but upon such appeal the district court is without jurisdiction to determine the propriety, in any other respect, of the order of the county board establishing the ditch.  
—Mundwiler v. Bentson, 69.

**AFTER REVERSAL OF ORDER.**

2. Upon the reversal of the order of the county board, because it provided for the draining of a meandered lake not properly subject to drainage, it may proceed with the drainage project except in so far as it affects the meandered lake.  
—Mundwiler v. Bentson, 69.

**RIGHT TO USE DITCH.**

3. Under the evidence the plaintiff had a right by prescription and by way of estoppel to the use of a ditch on the defendant's land; and the finding that the defendant did not obstruct said ditch was not justified by the evidence.  
—Schuette v. Sutter, 150.

**ENFORCEMENT OF AGREEMENT TO DRAIN.**

4. The plaintiff was not entitled to specific performance of the defendant's agreement to construct a system of tile drainage upon his land in place of the system of open drainage, the action was not one for specific performance, nor was it tried as such, nor was relief appropriate to such action given, and the judgment was erroneous.  
—Schuette v. Sutter, 150.

**RIGHT TO INJUNCTION.**

5. Upon the obstruction of such ditch the plaintiff was entitled to injunctive relief.  
—Schuette v. Sutter, 150.

**EASEMENT. See BROKER, 2.****ELECTION.**

The Commission Charter of the City of St. Paul, adopted in 1912, sustained

**ELECTION—Continued.**

as against the contention that, by reason of its educational features, its adoption, solely by the male voters or otherwise, was not authorized by Const. art. 4, § 36, relating to home rule charters, and that such provisions contravene Const. art. 8, §§ 1, 3, relating to establishment and maintenance of public schools, and, both in themselves and in the manner of their adoption, violate article 7, § 8, enfranchising women in educational matters.

—State ex rel. v. City of St. Paul, 82.

**ELECTRICITY.** See **EMINENT DOMAIN**, 1; **MECHANIC'S LIEN**, 1; **TAXATION**, 1.

**EMINENT DOMAIN.****PUBLIC USE.**

1. The furnishing of electric light and power to the public is a public service, and land or water taken to forward such an enterprise is taken for a public use.

—Otter Tail Power Co. v. Brastad, 415.

**CONDEMNATION OF WATER RIGHTS.**

2. A public service corporation, authorized to condemn private property, cannot interfere with the navigable capacity of any navigable stream, unless authorized by statute; but it may take the private rights of property of the riparian owner upon compliance with the Constitution and laws of the state, and upon making just compensation, whether the stream be navigable or not.

—Otter Tail Power Co. v. Brastad, 415.

**RECOVERY OF AWARD FROM CITY OF ST. PAUL.**

3. Section 251 of the St. Paul City Charter in force in 1913 makes the compensation awarded a public charge, so that it may be recovered by the property owner with sufficient certainty to comply with the constitutional requirement of security of compensation.

—State ex rel. v. District Court of Ramsey County, 433.

**ASCERTAINING DAMAGES OF THOSE HAVING SEPARATE INTERESTS.**

4. Where several persons have separate estates or interests in a single tract or parcel of land taken in condemnation proceedings, the proper mode of reaching a fair valuation of the property, and of ascertaining the damages of those interested, is to treat the property as though the entire estate and all interests therein were in a single person, and to find the value and damage in gross, leaving the apportionment of the award

**EMINENT DOMAIN—Continued.**

to be thereafter made according to the previous interests of the parties in the property.

—State ex rel. v. District Court of Ramsey County, 432.

5. Neither a separate assessment of damages to the several interests in the property nor a subsequent apportionment of the gross award is essential to the validity of the assessment, unless such is required by statute.

—State ex rel. v. District Court of Ramsey County, 433.

**SAME—PROCEDURE UNDER ST. PAUL CHARTER.**

6. Section 247 of the charter, providing that "if the lands and buildings belong to different persons, or if the land be subject to lease, the damages done to such persons, respectively, may be awarded to them by the board of public works, less the benefits resulting to them, respectively, from the improvement," held not to require the board either to make a separate assessment of relator's interest in the property as lessee, or subsequently to apportion to him his share of the gross award. Nor was such required under the terms of sections 251 and 253.

—State ex rel. v. District Court of Ramsey County, 433.

**PAYMENT OF AWARD.**

7. Because the gross award in condemnation proceedings has been paid to the fee owner, it does not follow that another person having an interest in the land condemned is without remedy, nor does such payment fulfil the constitutional requirement of security of compensation. Const. art. 1, § 13.

—State ex rel. v. District Court of Ramsey County, 438, 439.

**PAYMENT OF AWARD BY CITY OF ST. PAUL.**

8. Payment by the city of the gross award to the fee owner did not deprive relator, as lessee, of his constitutional right of security of compensation for the taking of his property; for, while his right of recovery against the fee owner does not fulfil the constitutional guaranty, the fund must be deemed as still in the hands of the city, subject to be brought into court for apportionment at the instance of relator, of whose claim the city had notice before paying the fee owner.

—State ex rel. v. District Court of Ramsey County, 433.

**PETITION TO CONDEMN—DESCRIPTION OF RIGHT.**

9. A description of the right to be taken as "a portion of the waters of the Otter Tail river \* \* \* leaving at all times in the channel of said river sufficient water for all public and domestic uses," is a sufficiently definite description.

—Otter Tail Power Co. v. Brastad, 416.

**EMINENT DOMAIN—Continued.**

10. The provision in respect to domestic uses requires petitioner to leave at all times sufficient fresh running water to supply all the private uses of water and ice which may at any time be incident to the proper enjoyment of the riparian property.  
—Otter Tail Power Co. v. Brastad, 420.
11. The description of the land or rights to be taken should be as definite as would be necessary in a deed. It is necessary that the description should be definite enough so that the commissioners and the court and the jury may fairly estimate the compensation to be allowed. It is of little consequence whether the description furnishes data for an estimate of the value of the benefit which the petitioner may receive.  
—Otter Tail Power Co. v. Brastad, 418, 419.
12. It is not necessary that the petition of a corporation in condemnation proceedings should allege that the proceeding was authorized by its board of directors.  
—Otter Tail Power Co. v. Brastad, 415.

**REVIEW OF AWARD ON APPEAL.**

13. An appeal to the district court from the award of damages in proceedings for the condemnation of land under the provisions of chapter 41, G. S. 1913, §§ 5395-5428, is to be treated, and heard and disposed of in the district court as an ordinary civil action, and in accordance with the rules of procedure applicable to such action.  
—Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. Goodspeed, 66.
14. Such appeals, at least when limited to the issue of damages, may be dismissed by the appellant, without the consent of the respondent, in the manner and as provided for by section 7825, G. S. 1913.  
—Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. Goodspeed, 66.

**REVIEW OF JUDGMENT.**

15. In proceedings to condemn a railroad right of way, the commissioners awarded to the landowner a specific sum of money as damages, and, in addition thereto, imposed upon the company the obligation to construct a cattle pass and certain culverts for the use of the landowner. The company appealed, and by the notice thereof limited the issues raised thereby to the question of damages. The jury in the district court reduced the damages from the amount awarded by the commissioners, but the verdict contained no reference to the conditions imposed by the report of the commissioners. The company caused judgment to be entered 128 M.—37.

**EMINENT DOMAIN—Continued.**

tered upon the verdict, and the judgment made no reference to the conditions. The amount thereby awarded to the landowner was paid, and he formally satisfied the judgment. It is *held*: The award of the commissioners imposing the conditions referred to was not nullified by the appeal, and, since that branch of the proceeding was not challenged on the trial of the appeal, the conditions remained in force and effect.

—Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. Grimes, 321.

**CORRECTION OF JUDGMENT.**

16. The court properly corrected and amended the judgment by incorporating this provision of the commissioners' report, notwithstanding the fact that judgment as to damages had been paid and discharged.

—Minneapolis, St. Paul, Rochester & Dubuque Electric Traction Co. v. Grimes, 322.

**DAMAGES.**

17. Defendant had 100 acres of bottom hay land along the river. Below the sod were a few inches of sandy loam, then coarse sand two to four feet deep and underneath a layer of quicksand. The issue was whether taking water from the river by petitioner would cause excessive drainage of the land. *Held*: The damages assessed are not so inadequate as to require the granting of a new trial or any disturbance of the verdict.

—Otter Tail Power Co. v. Brastad, 416.

**APPEAL FROM AWARD—NOTICE OF PROTEST.**

See **APPEAL AND ERROR**, 3.

18. Notice of protest against an award of damages by commissioners on the ground that it was inadequate, *held* sufficient under Laws 1913, p. 488, c. 345, to permit an appeal to the district court, and it was error to dismiss the appeal.

—Noodelman v. City of Minneapolis, 531.

**ENGINEER.****DUTY OF CIVIL ENGINEER.**

In designing and superintending the construction of bridges, it was plaintiff's duty to exercise such care, skill and diligence as men engaged in the profession of civil engineer ordinarily exercise under like circumstances. He was not an insurer that the contractors would perform their work properly in all respects, but it was his duty to exercise reasonable care to see that they did.

—Cowles v. City of Minneapolis, 453, 454.

**ENGINEER—Continued.**

**ACTION FOR COMPENSATION.**

See **CONTRACT**, 9.

**ESTOPPEL.** See **ABANDONMENT**, 1; **COMPROMISE AND SETTLEMENT**, 2; **DRAIN**, 3; **FRAUDS (STATUTE OF)**, 5; **MORTGAGE**, 2, 4.

The acceptance of money, when remitted by check, is not sufficient to constitute an estoppel against the landlord in an action by the proposed tenant to enforce an oral agreement to lease for a longer term than one year, since it was tendered to plaintiff at the time of the disagreement over the negotiations.

—**Hanson v. Marion**, 472.

**EVIDENCE.**

**OF CONVERSATION WITH DECEDENT.**

See **WITNESS**, 1, 2.

**OF CONVERSION.**

See **TROVER AND CONVERSION**, 2.

**OF MARRIAGE.**

See **JUDGMENT**, 3.

**CONCERNING STATEMENT OF TESTATOR.**

See **WILL**, 3.

**EXCLUSION OF EVIDENCE.**

See **APPEAL AND ERROR**, 21, 22.

**ADMISSIBLE EVIDENCE.**

See **EVIDENCE**, 13.

**STRIKING OUT EVIDENCE.**

See **APPEAL AND ERROR**, 11.

**G. S. 1913, § 6998, NOT A RULE OF EVIDENCE.**

See **FRAUDS (STATUTE OF)**, 2.

**FAILURE TO OBJECT.**

See **FRAUDS (STATUTE OF)**, 7.

**JUDICIAL NOTICE.**

See **PUBLIC LAND**, 6.

1. It is common knowledge that retailers buy merchandise on certain specified time, agreeing to pay interest under certain terms.

—**Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co.** 76.

## EVIDENCE—Continued.

2. It is a matter of common knowledge that any team of horses will take fright at the falling of a wagon tongue.

—Schulz v. Duel, 216.

## PRESUMPTION.

See APPEAL AND ERROR, 13; USURY; WORK AND LABOR, 1.

## BURDEN OF PROOF.

See CARRIER, 1; INSURANCE, 1.

## RES GESTÆ.

See EVIDENCE, 6.

## INCOMPETENT EVIDENCE.

See TRIAL, 5, 6.

## BEST AND SECONDARY.

3. Oral evidence of action of the board of directors of a corporation is properly admitted against the objection that it is not the best evidence, when it does not appear that any written evidence of such action exists.
- Traxler v. Minneapolis Cedar & Lumber Co. 295.

## ADMISSION NOT BINDING ON DEFENDANT.

4. Alleged admissions of defendant's children concerning their father's horses, not made in the presence of the father and of which he had no knowledge, cannot bind him and have no probative force against him.

—Schulz v. Duel, 216.

## DECLARATION OF PERSON NOW DEAD.

5. Declaration of the mortgagor, since deceased, tending to indicate his claim that the property was his homestead, and made while he was the owner and in possession of the property, were properly received in evidence.

—Lamont v. Lamont, 525.

## ADMISSION BY AGENT.

6. Statements or admissions made by a foreman as to the cause of an accident to plaintiff, so remote from the occurrence to which they relate as not to be part of the *res gestæ*, are inadmissible against the principal, unless authority to speak for the principal be first shown.

—Berg v. Pittsburgh Construction Co. 408.

## ADMISSION BY BANK OFFICER.

7. Statements of officers of the bank made in a casual conversation with plaintiff, or in an affidavit procured by plaintiff for his own purposes, are not admissions of the bank, nor evidence against the bank.

—McCoy v. City National Bank of Duluth, 456.

## EVIDENCE—Continued.

## HEARSAY.

See EVIDENCE, 13.

## DOCUMENTARY EVIDENCE.

See APPEAL AND ERROR, 20.

## BOOKS AND RECORDS.

See CRIMINAL LAW, 2; STIPULATION.

## PAROL EVIDENCE TO EXPLAIN WRITTEN CONTRACT.

8. The contract not being within the statute of frauds, it was permissible by oral testimony to prove that another contract constituted a consideration, although no reference is made thereto in either contract.

—Klemik v. Henricksen Jewelry Co. 491.

## PAROL EVIDENCE TO VARY WRITING.

See APPEAL AND ERROR, 19; ASSIGNMENT, 1.

9. Action upon a promissory note given for the first premium on a policy of life insurance. The note contained a clause giving to the maker the "privilege of increasing or decreasing insurance on first payment." *Held*: Evidence of a contemporaneous oral agreement that, before writing the policy, the payee should inquire whether defendant desired to exercise the option, varies the written agreement and is not admissible.

—Wadsworth v. Walsh, 241.

## PAROL EVIDENCE TO PROVE CONDITION.

10. Where a written order for goods is given, it is competent to prove that at the time of delivery of the order the parties agreed that it should become operative only upon the happening of a contingency or the performance of a condition.

—S. F. Bowser & Co. v. Fountain, 198.

## OPINION EVIDENCE.

See CRIMINAL LAW, 3.

11. A business man of mature years, who saw the automobile as it passed the rear end of the street car and watched it until it stopped, was competent, without further qualification other than reasonable intelligence and ordinary experience in life, to give an opinion as to its speed, though he had previously testified that he had never theretofore attempted to estimate the speed of a passing automobile, and could not state positively how fast the one in question was going.

—Daly v. Curry, 449.

**EVIDENCE—Continued.****OF EXPERT.**

See **AUTOMOBILE; NEW TRIAL, 3.**

**QUALIFICATION OF EXPERT.**

12. Trial court *held* not to have abused its discretion in the matter of qualification of witnesses to give expert testimony upon the practicability of fitting a mangle with hand guards.

—Graseth v. Northwestern Knitting Co. 245.

13. Expert testimony of a physician based in part upon statements made to him by others may properly be received if the evidence shows what the reported statements were and there is evidence in the case tending to prove their truth.

—Thompson v. Bankers Mutual Casualty Insurance Co. 475.

**PRIVILEGE OF PHYSICIAN.**

See **WITNESS, 3.**

**CONCLUSIVE EVIDENCE.**

See **NEGLIGENCE, 3.**

**PREPONDERANCE OF EVIDENCE.**

See **REFORMATION OF INSTRUMENT, 1.**

**EXCHANGE OF PROPERTY. See CONTRACT, 2.****INDEFINITENESS OF CONTRACT.**

1. The contract here involved is not void for uncertainty or indefiniteness.

—Wilkes v. Holmes, 349.

2. Action to rescind exchange of property (made without any examination of it) because of fraudulent representations. Judgment in favor of plaintiff. *Held*: The evidence justifies the decision and the court did not err in overruling objections to the admission of certain evidence.

—Milton v. Greer, 533.

**EXECUTION. See COSTS, 2.****MOTION TO VACATE LEVY.**

See **PARTITION, 5.**

**EXECUTOR AND ADMINISTRATOR.****APPOINTMENT OF SPECIAL ADMINISTRATOR.**

See **PLEADING, 2.**

**EXECUTOR AND ADMINISTRATOR—Continued.****SAME—PETITION NECESSARY.**

1. It conclusively appeared that no petition was presented to the probate court for the appointment of a special administrator. Such petition is jurisdictional (G. S. 1913, § 7227), and without it, the probate court has no jurisdiction to appoint such administrator, to approve his bond, or to issue letters of administration. Such orders are nullities, and a settlement of an action to recover for the death of plaintiff's intestate made by the special administrator, so attempted to be appointed, in no way binds the next of kin of deceased dependent upon him for support.  
—*Bombolis v. Minneapolis & St. Louis Railroad Co.* 112, 116, 117.

**SAME—JURISDICTION OF PROBATE COURT.**

2. The allegations of the reply were sufficient to raise the question of the jurisdiction of the probate court.  
—*Bombolis v. Minneapolis & St. Louis Railroad Co.* 112.

**ACTION BY HEIRS.**

3. A complaint in an action by heirs against the administrator of their intestate's estate, to recover the value of lands alleged to have been lost through defendant's failure to pay taxes or to redeem from tax sale, is demurrable where it contains no allegations of negligence and shows an unassailed discharge of defendant by a probate court having jurisdiction in the premises.  
—*Winters v. Ellefson*, 3.

**EXEMPTION.** See **TAXATION**, 12, 13.

**EXPENSE.** See **ATTORNEY AND CLIENT**, 3, 9; **CONTRACT**, 3, 7; **MECHANIC'S LIEN**, 6-8; **MUNICIPAL CORPORATION**, 3; **PARTITION**, 5; **SALE**, 5, 6; **VENDOR AND PURCHASER**, 4.

**OF LITIGATION.**

See **CONTRACT**, 6.

**EXPERT.** See **EVIDENCE**, 12, 13.

**FEE OF EXPERT WITNESS.**

See **APPEAL AND ERROR**, 5.

**EXPULSION OF MEMBER.** See **INSURANCE**, 5, 6.

**FALSE REPRESENTATION.** See **APPEAL AND ERROR**, 15; **COMPROMISE AND SETTLEMENT**, 1; **CRIMINAL LAW**, 10, 11.

**FEDERAL EMPLOYER'S LIABILITY ACT.** See **COMMERCE**, 2, 3; **DEATH**, 1, 2; **TRIAL**, 13.

1. In this action under the Federal Employer's Liability Act to recover for the death of plaintiff's intestate, it is *held* the evidence made a case for the jury, and is sufficient to sustain the verdict.

—*Bombolis v. Minneapolis & St. Louis Railroad Co.* 112.

2. Where the plaintiff, a section foreman, was working with others in taking out rails from the main line of an interstate carrier and putting others in their place, loading those taken out onto a flat car near by, and was injured while so loading, it was at least a question for the jury whether he was employed in interstate commerce within the Federal Employer's Liability Act. (35 St. 65, c. 149.)

—*Cherpeski v. Great Northern Railway Co.* 360.

**FEDERAL SAFETY APPLIANCE ACT.** See **COMMERCE**, 2.

The act of a switchman in stepping between moving cars to make an uncoupling because of a defective coupler is not the sole proximate cause of an injury received by him while so doing. The violation of the Federal Safety Appliance Act is a contributing cause of the injury.

—*Otos v. Great Northern Railway Co.* 283.

**FELLOW SERVANT.** See **MASTER AND SERVANT**, 5, 29.

**FINE.** See **CONTEMPT**, 2, 5.

**FIXTURE.** See **MECHANIC'S LIEN**, 1; **TAXATION**, 1.

**FORCIBLE ENTRY AND UNLAWFUL DETAINER.**

Action of unlawful detainer. *Held*: A month's notice to quit premises leased from month to month entitled plaintiff to possession.

—*Anderson v. Meyer*, 534.

**FORFEITURE.** See **STREET RAILWAY**, 3.

A statute may create a self-executing forfeiture so that upon failure to perform the condition all right under it is at an end. Whether it does this is a question of legislative intent.

—*State ex rel. v. Duluth Street Railway Co.* 319.

**FRANCHISE.** See **STREET RAILWAY**, 1, 3, 4.

**FRAUD.** See **COMPROMISE AND SETTLEMENT**, 2; **INSURANCE**, 3; **REFORMATION OF INSTRUMENT**, 1.

**FRAUDS (STATUTE OF).** See EVIDENCE, 8; TRIAL, 6.

**LEASE FOR TERM LONGER THAN ONE YEAR.**

See ESTOPPEL.

**PROMISE TO DISCHARGE DEBT.**

1. The contract sued on was not within the statute of frauds, requiring the consideration to be expressed therein.

—Klemik v. Henriksen Jewelry Co. 491.

**CONSTRUCTION OF STATUTE.**

2. The statute (section 6998, G. S. 1913), declares that no action can be maintained upon a contract therein referred to, unless in writing. It is *held* that the statute is not to be construed as prescribing a mere rule of evidence, but rather as precluding the substantive right of action upon the oral contract.

—Hanson v. Marion, 468.

3. Cram v. Thompson, 87 Minn. 172, 91 N. W. 483, to the effect that a parol agreement to execute a lease of real property, the lease when executed to extend over a longer period than one year, is within the statute of frauds and unenforceable, followed and applied.

—Hanson v. Marion, 468.

4. The city, having been permitted to go into possession under the contract and make valuable improvements upon the land, is now entitled to a conveyance thereof; it being all the time ready and willing to perform according to contract. The reception in evidence of a preliminary written proposition to deal with the city, if error, was without prejudice.

—Midway Realty Co. v. City of St. Paul, 135.

**ESTOPPEL.**

5. The conclusion of the trial court that there was no evidence to justify an application of the doctrine of estoppel, and thereby to preclude defendant from invoking the statute, *held* sustained by the record.

—Hanson v. Marion, 468.

**MOTION TO DISMISS.**

6. Where it does not appear from the pleadings that the contract sued upon was in parol and within the statute of frauds, the statute may be taken advantage of by motion to dismiss at the close of plaintiff's case.

—Hanson v. Marion, 468.

7. In such case the failure to object to the evidence when offered is not a waiver of the right to rely upon the statute.

—Hanson v. Marion, 468.

**GARNISHMENT.****ACTION AGAINST GARNISHEE BANK.**

In a suit against the King Commission Company (a corporation), defendant bank was garnished and disclosed an indebtedness to the commission company. Judgment was rendered against the bank upon its disclosures and the judgment was paid. Thereafter plaintiff brought this suit to recover the money from the bank, claiming that, although it had been deposited in the name of the King Commission Company, it in fact belonged to one A. A. King and that his title thereto had passed to plaintiff. *Held*, that there was no evidence sufficient to sustain a finding that the money did not belong to the corporation.

—McCoy v. City National Bank of Duluth, 455.

**GUARDIAN.****APPOINTMENT.**

See **INCOMPETENT**, 1.

**WHO SHOULD BE APPOINTED.**

See **INCOMPETENT**, 4.

**HIGHWAY.****VIOLATION OF STATUTE.**

1. It is *held* that under Laws 1911, p. 499, c. 365, § 15 (G. S. 1913, § 2634), prohibiting the operator of a motor vehicle from passing a draft animal driven by a woman, child, or aged person, at a greater speed than four miles an hour, one violating such statute is liable for the injuries proximately resulting to those for whose protection it was intended.

—Schaar v. Conforth, 460.

2. It does not follow that this statute is a license to the driver always to pass at the speed indicated. The situation may be such that he is liable for passing at a less speed or in attempting to pass at all. In such event his conduct, in the absence of statute, is measured by the common law.

—Schaar v. Conforth, 463.

3. The provision of Laws 1911, p. 499, c. 365, §§ 13, 15 (G. S. 1913, §§ 2632, 2634), requiring the operator of a motor vehicle to bring his machine to a stop in certain instances is governed by the rule stated; and other provisions of said sections relative to the care to be exercised by the operator fix a standard of conduct the nonobservance of which is negligence.

—Schaar v. Conforth, 460.

**HIGHWAY—Continued.**

**OPERATION OF AUTOMOBILE—COMPLIANCE WITH STATUTE.**

4. Under said sections requiring the operator of a motor vehicle to stop his machine when signaled by the driver of a rig which he is approaching, it is his duty to stop when the signal is given by an occupant of the rig though not the driver.

—Schaar v. Conforth, 460.

**HOME RULE CHARTER.** See **ELECTION.**

**HOMESTEAD.** See **EVIDENCE**, 5; **JUDGMENT**, 3.

**HOMICIDE.** See **CRIMINAL LAW**, 2, 3, 6, 8.

**HUSBAND AND WIFE.** See **DEED**, 3; **MORTGAGE**, 5.

**EVIDENCE OF MARRIAGE.**

See **JUDGMENT**, 3.

**SPOUSE AS WITNESS.**

See **CRIMINAL LAW**, 5-7.

**INCOMPETENT.** See **COMPROMISE AND SETTLEMENT**, 3; **TRUST**, 1; **WILL**, 1.

**APPOINTMENT OF GUARDIAN OF PROPERTY.**

1. In proceedings under the statute for the appointment of a guardian of the property interests of an alleged incompetent person, it is held that the findings of the trial court are sustained by the evidence.

—Prokosch v. Brust, 324.

2. The statutes providing for the cross-examination of an adverse party have no application to the proceeding; yet the court may require the alleged incompetent to submit to examination for the purpose of testing his or her mental condition.

—Prokosch v. Brust, 325.

3. The proceeding is not adversary in nature but rather one by the state in its character of *parens patriæ* and the manner and method of determining the facts rests in the sound discretion of the trial court, controlled, in a general way, by the rules of ordinary judicial procedure.

—Prokosch v. Brust, 324.

4. An alleged incompetent was 74 years old, could neither read nor write, spoke English very imperfectly, and admitted the necessity of having

**INCOMPETENT—Continued.**

assistance in business matters. Since her husband's death she had relied on her son. The court held that a guardian should be appointed and he should be the son, although he had declined an invitation from the petitioners, his sisters, to accept the trust because he was opposed to the appointment of any guardian.

—Prokosch v. Brust, 326, 328.

**INDIAN.****ENTRY OF LAND CEDED BY CHIPPEWA TREATY.**

See PUBLIC LAND, 5, 6.

**INDICTMENT AND INFORMATION.** See CRIMINAL LAW, 10.

**INJUNCTION.** See APPEAL AND ERROR, 14; DRAIN, 5; WATER AND WATER-COURSE, 2.

**INSANITY.** See INCOMPETENT; WILL, 5.

**INSURANCE.****ACCIDENT INSURANCE.**

See AUTOMOBILE.

1. This action is brought on an accident insurance policy to recover for death due to accidental injury. By the terms of the policy there can be no recovery if deceased was intoxicated at the time of injury. The burden was on the defendant to prove intoxication. The evidence is conflicting and it is not conclusive that deceased was intoxicated.

—Thompson v. Bankers Mutual Casualty Insurance Co. 474.

2. Any evidence tending to cast doubt upon defendant's theory of intoxication was proper, though not sufficient in itself to disprove it.

—Thompson v. Bankers Mutual Casualty Insurance Co. 475.

**HAIL INSURANCE.**

See APPEAL AND ERROR, 24.

3. Action upon policy. Defense, adjustment of loss in writing. Reply, that the writing was procured by fraud. Verdict in favor of plaintiff. *Held:* The evidence supported the conclusion that the adjustment was procured by fraud. The court's charge that plaintiff was entitled to recover at least the amount of the pretended adjustment and such further amount as the evidence justified, if the jury found the settlement was procured by fraud, was clearly right.

—Johnson v. Minnesota Farmers Mutual Insurance Co. 1, 2.

**INSURANCE—Continued.****LIFE INSURANCE.**

See **CONSIDERATION.**

4. A clause in a note given for the first premium of a policy of life insurance, which gives the "privilege of increasing or decreasing insurance on first payment," gives to the maker an option, and if he desires to avail himself of it the obligation is upon him to so signify.

—Wadsworth v. Walsh, 241.

**MUTUAL BENEFIT INSURANCE.**

5. The laws of defendant society, prescribing the grounds upon which members may be expelled and the procedure to be followed in the trial of charges against them, are sufficient and valid. Such laws provide for a trial before the national executive committee, and for an appeal from the decision of that committee to the national council, and a judgment lawfully rendered by such committee is final and conclusive, unless an appeal be taken therefrom.

—Rigler v. National Council of Knights and Ladies of Security, 51.

6. The committee having rendered a judgment of expulsion, from which no appeal was taken, such judgment can be attacked, in this action, only upon the ground that it is void for failure to accord the assured such a trial as the laws of the society secured to her, and the record in this case will not justify a finding to that effect.

—Rigler v. National Council of Knights and Ladies of Security, 52.

**INTENT.** See **FORFEITURE**; **TAXATION**, 9; **USURY**.

**INTEREST.**

The court was right in computing interest on the items in the invoices of merchandise according to the terms indicated by the ledger sheets.

—Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co. 76.

**INTERFERENCE BY COURT.** See **TRUST**, 2, 3.

**INTERVENTION.** See **ATTORNEY AND CLIENT**, 7.

**INTOXICATION.** See **AUTOMOBILE**; **INSURANCE**, 1, 2; **WORKMEN'S COMPENSATION ACT**, 4.

## JUDGMENT.

## AMENDMENT.

See APPEAL AND ERROR, 1; EMINENT DOMAIN, 16.

## LIEN OF JUDGMENT.

See ADVERSE CLAIM, 3.

## VACATING DEFAULT.

## ABSENCE OF DEFENDANT FROM TRIAL.

1. Where the court had experienced difficulty in proceeding with its work because counsel were not prepared, and a cause was set for trial on May 11, with the understanding that it would be disposed of on that day, unless previously settled, and when reached on that day was tried in the absence of defendant, and a verdict rendered for plaintiff, *held*: The order of the court refusing to relieve defendant from its failure to appear at the time set for the trial of the action was not an abuse of its discretion.

—H. W. Johns-Manville Co. v. Great Northern Hotel Co. 311.

## PAYMENT.

See GARNISHMENT; MORTGAGE, 5.

## SATISFACTION.

See APPEAL AND ERROR, 1; DEED, 3; EMINENT DOMAIN, 15, 16.

## COLLATERAL ATTACK.

See INSURANCE, 6.

2. It is elementary that orders and judgments of all courts are not subject to collateral attack for error or irregularity, but where the court is without jurisdiction letters of administration are void and may be attacked collaterally.

—Bombolis v. Minneapolis & St. Louis Railroad Co. 117.

## AS EVIDENCE OF MARRIAGE.

3. In this action to set aside the foreclosure of a mortgage on the grounds that the mortgagor, at the time the mortgage was executed, was married, that the property was the homestead, and that the wife did not join in the mortgage, it is *held*: It was error to receive in evidence, on the issue of marriage, a judgment in a prior action to which the defendant here was not a party. The error was prejudicial.

—Lamont v. Lamont, 525.

## APPEAL FROM JUDGMENT.

See EMINENT DOMAIN, 15.

**JUDGMENT—Continued.**

4. Judgment notwithstanding verdict was denied. Defendant appealed from the order denying judgment and gave a *supersedeas* bond. Plaintiff ignored the appeal, taxed costs and had judgment entered on the verdict. Defendant dismissed the appeal from the order and appealed from the judgment. *Held*: The order was not appealable and the attempted appeal and bond did not deprive the district court of jurisdiction to enter judgment.

—Velin v. Lauer Brothers, 13.

**JUDGMENT NOTWITHSTANDING VERDICT.** See DEATH, 2; JUDGMENT, 4; MASTER AND SERVANT, 14, 22; NEW TRIAL, 2.

1. Action for personal injury. Verdict for plaintiff. *Held*: The court erred in denying defendant's motion for judgment notwithstanding the verdict.

—Carlson v. Elwell, 440, 445.

2. If, after verdict, the unsuccessful party moves for judgment notwithstanding the verdict but does not move for a new trial, he waives all errors in the admission of evidence or in the charge to the jury. Final judgment cannot be given to the defeated party because the cause was erroneously tried.

—Northwestern Marble & Tile Co. v. Williams, 514.

**JURISDICTION.** See CONTEMPT, 1.

OF DISTRICT COURT.

See APPEAL AND ERROR, 6; DRAIN, 1.

OF PROBATE COURT.

See EXECUTOR AND ADMINISTRATOR, 1.

**LAKE.**

MEANDERED LAKE.

See DRAIN, 1, 2.

**LANDLORD AND TENANT.**

ORAL AGREEMENT TO LEASE FOR MORE THAN ONE YEAR.

See FRAUDS (STATUTE OF), 3, 6; ESTOPPEL.

LEASE WITH OPTION TO BUY.

See VENDOR AND PURCHASER, 1.

**LANDLORD AND TENANT—Continued.****CONSTRUCTION OF LEASE.**

See CROP, 2; VENDOR AND PURCHASER, 3.

**CONDEMNATION OF LEASEHOLD.**

See EMINENT DOMAIN, 6-8.

1. Evidence in an action to recover rent *held* to establish the existence of the lease sued on.

—Klink v. Val Blatz Brewing Co. 144.

**NOTICE TO QUIT.**

See FORCIBLE ENTRY AND UNLAWFUL DETAINER.

**TERMINATION OF LEASE BY SURRENDER OF PREMISES.**

2. Question of defendant's alleged surrender of the leased premises to plaintiff so as to terminate the lease, *held* properly submitted to the jury.

—Klink v. Val Blatz Brewing Co. 144.

LARCENY. See CRIMINAL LAW, 10, 11.

LEGISLATURE. See FORFEITURE; TAXATION, 9.

LIEN. See ADVERSE CLAIM, 3; MECHANIC'S LIEN.

LIMITATION OF ACTION. See MORTGAGE, 4; PUBLIC LAND, 3; STATUTE, 1.

LIS PENDENS. See TRUST, 5.

LOG AND LOGGING. See MASTER AND SERVANT, 2, 15, 20; PUBLIC LAND, 2, 3; STATUTE, 1.

**WHETHER INDEPENDENT CONTRACTOR OR EMPLOYEE.**

See MASTER AND SERVANT, 2.

**CUTTING TIMBER ON STATE LAND.**

See PUBLIC LAND, 2, 3.

**LIEN.**

1. A claim for hire of teams and their equipment in connection with logging work *held*, under the findings, ruled by McKinnon v. Red River Lumber Co. 119 Minn. 479, 138 N. W. 781, and hence not lienable.

—Kenny & Anker v. Duluth Log Co. 6.

**FILING OF LIEN STATEMENT.**

2. Where work for which a log lien is claimed was begun prior to October 1, and completed thereafter in the course of continuous employment,

**LOG AND LOGGING—Continued.**

only that portion done between the date mentioned and April 1 thereafter is within the provision of R. L. 1905, § 3526 (G. S. 1913, § 7060), and where the work is "wholly performed between October 1 and April 1 next thereafter" the statement may be filed on or before the last day of April.

—Kenny & Anker v. Duluth Log Co. 5.

**ENFORCEMENT OF LIEN.**

3. Findings in actions to foreclose log liens *held* fatally defective as regards the contingencies prescribed by G. S. 1913, as conditions precedent to the right to file the lien statements, in that they showed neither demands for payment before the filings nor that the labor for which the liens were claimed was terminated by the employer's act or by completion of the work.

—Kenny & Anker v. Duluth Log Co. 5.

4. In such case defendant was not required to make application to amend the findings so as to make them affirmatively show absence of demand, in order to object to the judgment entered upon the findings.

—Kenny & Anker v. Duluth Log Co. 7.

5. Answers *held* sufficient to raise issues upon plaintiff's allegations of due demand.

—Kenny & Anker v. Duluth Log Co. 5.

**MANDAMUS. See NEW TRIAL, 1.**

1. An action against relator in the municipal court of Hibbing was transferred to the municipal court of Duluth, and by the latter court was remanded to the former court. If the action was improperly remanded, *mandamus* was the appropriate remedy, it is assumed.

—State ex rel. v. Municipal Court of Duluth, 226.

**TO ENFORCE PASSENGER RATES.**

2. Alternative writ granted upon the relation of the attorney general, requiring respondent to put in effect the rates of fare prescribed by Laws 1913, p. 775, c. 536 (the Bendixen law). *Held*: The court erred in refusing to quash the writ and in overruling the demurrer to the petition and writ.

—State ex rel. v. Chicago, Milwaukee & St. Paul Railway Co. 25.

**MASTER AND SERVANT. See TOBT; WORKMEN'S COMPENSATION ACT, 7, 8. 128 M.—38.**

**MASTER AND SERVANT—Continued.****EXISTENCE OF RELATION.**

See CONSTITUTION, 3; WORKMEN'S COMPENSATION ACT, 2-4.

1. The test for determining whether one person is the employee of another, within the rule making the employer responsible for injuries resulting from the negligence of his employee, is whether such person possessed the power to control the other in respect to the transaction out of which the injury arose.

—State ex rel. v. District Court of St. Louis County, 43.

2. A workman who was paid for piece work in cutting ties, poles and posts from timber owned by the employer, required to cut the timber clean as he went, and to conform to specifications of the employer and to pile the brush, whose work was inspected from time to time, and could be discharged at any time,—was not an independent contractor but an employee.

—State ex rel. v. District Court of St. Louis County, 45, 46.

**EVIDENCE OF RELATION.**

3. Evidence, in an action to recover for services rendered by plaintiff at defendants' request, in nursing a patient at a sanatorium, held sufficient to sustain a recovery as upon an express contract, established by reference to the terms under which prior services of the same general character were rendered by plaintiff for defendants, supplemented by the conduct of the parties.

—Dybvig v. Minneapolis Sanatorium, 292.

4. There was no reversible error in the rulings concerning evidence or in the instructions.

—Dybvig v. Minneapolis Sanatorium, 292.

**SAFE PLACE TO WORK.**

See MASTER AND SERVANT, 9, 13, 15, 21.

5. One of the absolute duties of the master is to use reasonable care to provide a safe place to work. This duty is not violated where the unsafety is caused by acts of co-servants in carrying out the details of the work. The master may adopt rules to facilitate the carrying on of his business, and these rules may operate for the protection of servants exposed to dangers. The question then arises whether the enforcement of such rules is an absolute duty of the master.

—Arveson v. Boston Coal Dock & Wharf Co. 179.

6. Action for personal injury to bridge builder, who fell from a stone

**MASTER AND SERVANT—Continued.**

abutment while at work chipping away rock. Evidence considered, and *held* to conclusively show no negligence on the part of defendant.

—Hanson v. Great Northern Railway Co. 122.

**APPLIANCES FOR WORK.**

7. A master's compliance with a general custom in respect to appliances furnished the servant to aid his work does not, of itself, constitute due care. Neither can custom nor usage justify a negligent act.

—Stash v. Great Northern Railway Co. 331.

8. The record herein discloses that the temporary staging, which defendant's servants provided in doing a work which was neither dangerous nor complicated, was not an instrumentality of the sort which it is the master's absolute duty to furnish or inspect.

—Berg v. Pittsburgh Construction Co. 408.

**DEFECTIVE APPLIANCE.**

9. Evidence *held* sufficient to sustain a finding that defendant was negligent in failing to furnish plaintiff, its servant, with a safe place in which to work, in that it did not cleat the lower end of a running board bridging an open space between a platform and a car and over which plaintiff was required to wheel a truck while unloading the car, whereby the board slipped as he was passing over it, and he was injured. Mere lack of evidence regarding previous slipping of running boards, or of accidents so caused, is not persuasive of the absence of negligence.

—Stash v. Great Northern Railway Co. 329, 331.

10. The defendant was constructing a silo and the plaintiff was working for it on a staging. A timber, which was not defective, broke, and the plaintiff was precipitated to the ground and injured. The silo, and the staging used in its construction, were built under the supervision and direction of the defendant's foreman. It is *held*, the accident having occurred prior to the enactment of Laws 1913, p. 458, c. 316, § 13 (G. S. 1913, § 3874), relative to scaffolds, etc., that the defendant did not owe the plaintiff the absolute duty of seeing that a proper plan of construction of the staging was used, and that, it having furnished sufficient and proper material for the staging, it was not negligent.

—Block v. Minnesota Farmers Brick & Tile Co. 71.

11. Action for personal injury by falling from a loose plank in a scaffold while at work in moving a sheet steel smokestack. The court submitted to the jury the question whether the plank was placed in a reasonably safe and secure manner. *Held*: There was ample evidence

**MASTER AND SERVANT—Continued.**

to establish the facts which under the court's instructions warranted a recovery.

—Quinn v. St. Paul Boiler & Manufacturing Co. 271, 274.

**DUTY OF MASTER TO ENFORCE RULES.**

See **MASTER AND SERVANT**, 5.

12. It is not the absolute duty of the master to see that every rule of his business is observed. His obligation in respect to mere details of the work is not rendered more extensive by the mere fact that he has systematized those details by adopting rules. If, however, the office of the rule is to provide a method for the discharge of some nondelegable duty of the master, then his duty to see that the rule is observed is absolute and nondelegable.

—Arveson v. Boston Coal Dock & Wharf Co. 179.

13. Where the servant is required to work in a place which is necessarily rendered dangerous by the doing of some independent work of the master, then the master is required to control such independent work while the servant is so engaged. If he adopt rules or sanction customs designed to effect this end, it is his duty to see that such rules or customs are observed, and he is liable for the negligent failure of those charged with that duty.

—Arveson v. Boston Coal Dock & Wharf Co. 179.

**FAILURE TO WARN OF DANGER.**

See **MASTER AND SERVANT**, 27.

14. Action for death of plaintiff's intestate while at work removing a galvanized iron cornice, backed with brick, from building being wrecked. Evidence of failure to warn decedent considered, and *held* not to conclusively show that defendant was not negligent, or that plaintiff's intestate was guilty of contributory negligence, or assumed the risk. A motion for judgment notwithstanding the verdict was properly denied.

—Velin v. Lauer Brothers, 10, 13.

15. Action for personal injuries sustained while employed as oiler in defendants' sawmill. *Held*: (1) The question whether defendants' head sawyer was negligent in starting the log carriage for the day without giving the customary signals was properly submitted to the jury. (2) The question whether plaintiff was guilty of contributory negligence was properly submitted to the jury. He was not negligent as a matter of law.

—Johnson v. Sartell Brothers Co. 239.

**MASTER AND SERVANT—Continued.****FELLOW SERVANT.**

See **MASTER AND SERVANT**, 5, 29.

**VICE PRINCIPAL.**

16. Defendant company operated an unloading rig to unload coal from vessels to its dock. The two other defendants were hoisters and operated the machinery. Plaintiff was an oiler. It was extremely dangerous to oil the machinery when it was in motion. When plaintiff went upon the rig to oil, it was his custom to notify the hoisters, and it then became part of their business to keep the rig safe by keeping all machinery inoperative as long as plaintiff was on the rig and until he gave them a signal that he was through. On the occasion in question plaintiff went on the rig to oil when the machinery was not in motion. There is evidence that he notified the hoisters. Nevertheless one of the hoisters started the machinery while plaintiff was upon the rig, without receiving his signal, and plaintiff was injured. *Held*: The hoisters were vice principals and defendant company was liable for the negligence.

—*Arveson v. Boston Coal Dock & Wharf Co.* 178, 184, 185, 186.

**ASSUMPTION OF RISK.**

17. The doctrine of the assumption of risks is thoroughly established as a part of the law, and, while it is not favored, it is always applied in cases which are fairly within the rule.  
—*Davison v. Ressler*, 206.
18. A janitor who had stepped out upon a window ledge to clean the outside of the window, in attempting to raise it after completing his work, lost his balance and fell to the pavement. He had performed the same work under the same conditions for some years and was entirely familiar with the situation. *Held*, that he assumed the risk.  
—*Davison v. Ressler*, 204.
19. The issues of assumption of risk and contributory negligence were also for the jury.  
—*Graseth v. Northwestern Knitting Co.* 245, 249.
20. Action to recover for personal injuries. In unloading a car of logs plaintiff crawled under overhanging logs and attempted to dislodge the "key log" with his peavy. *Held*: He assumed the risk.  
—*Petra v. Crookston Lumber Co.* 479.
21. Evidence, in an action to recover damages for injuries alleged to have been caused by defendant's failure to furnish plaintiff, its servant, with a safe place to work and proper appliances, and its unsafe methods of work, whereby a bag of oats fell on plaintiff while he was unloading

**MASTER AND SERVANT—Continued.**

a continuous rubber belt elevator, *held* conclusively to establish the defense of assumption of risk.

—Johnson v. United Flour Mills Co. 297.

**CONTRIBUTORY NEGLIGENCE.**

See **MASTER AND SERVANT**, 19.

**EVIDENCE.**

22. In this, a personal injury action by a servant against his master, there is not such an absence of evidence to sustain an alleged failure of the master to discharge one of his absolute duties that defendant is entitled to judgment notwithstanding the verdict.

—Quinn v. St. Paul Boiler & Manufacturing Co. 270.

23. Plaintiff was injured by the running away of a team with which defendant was husking corn in his cornfield. Defendant was husking beside the wagon, with the reins fastened to the side of the wagon. It is conceded that this is a proper and customary manner of working with an ordinary team. *Held*, there is no evidence that this team was a runaway team or so wild or unsafe as to make it negligence for defendant to use it for husking corn in the usual manner.

—Schulz v. Duel, 213.

24. The court cannot determine, as a question of law, that the rule of *respondet superior* does not apply, unless the evidence shows conclusively that the alleged employer possessed no such power of control.

—State ex rel. v. District Court of St. Louis County, 43.

25. The question whether defendant was under obligation to furnish a safe door, and the question whether the duty of repair rested with plaintiff, were made issues of fact by the evidence, and should have been submitted to the jury.

—Bauer v. Great Northern Railway Co. 146.

26. The plaintiff, a section hand, working upon the defendant's right of way, was injured by a trespassing horse being struck by an engine and thrown against him. Upon a review of the evidence it is *held*:

- (1) That it was a question for the jury whether the trainmen saw the horse on the track and negligently failed to give a warning or slacken speed.
- (2) That it was a question for the jury whether the trainmen were negligent in failing to keep a proper lookout.
- (3) That it was a question for the jury whether the negligence of the defendant, in either of the respects mentioned, was the proximate cause of the injury to the plaintiff.

—Kommerstad v. Great Northern Railway Co. 505.

## MASTER AND SERVANT—Continued.

## GUARDING DANGEROUS MACHINERY.

27. Evidence in an action to recover damages for personal injuries received while operating a mangle in defendant's factory *held* sufficient to take the case to the jury on the issues of defendant's negligence in not providing the machine with a hand guard and in failing to instruct and warn.

—Graseth v. Northwestern Knitting Co. 245.

28. There was no reversible error either in the instructions given or in refusal of those demanded.

—Graseth v. Northwestern Knitting Co. 245.

29. It was a question for the jury whether the plaintiff was injured by the negligence of his fellow servants in raising one end of the rail while loading, without the customary signal, thereby causing the other end to hit him.

—Cherpeski v. Great Northern Railway Co. 360.

30. Plaintiff, a car repairer in the employ of defendant, was injured while adjusting a door upon a box car which had been placed in his department for repairs. It was claimed on the trial that the door was defective, in that the hinges holding it in place on the car were out of order, by reason of which the door fell upon and injured plaintiff. The negligence charged was the failure of defendant to provide plaintiff with a door in safe and suitable condition for use. Defendant claimed that it was plaintiff's duty to repair the door, if out of order, before attempting to place it in position on the car, and was therefore not entitled to recover. It is *held* that the trial court erred in instructing the jury that defendant was under legal obligation to furnish a safe and suitable door, and in refusing a requested instruction that if the duty of repair rested with plaintiff he could not recover.

—Bauer v. Great Northern Railway Co. 146.

## DOCTRINE OF RESPONDEAT SUPERIOR INAPPLICABLE.

31. The defendant radiator company employed a transfer company to make deliveries for it. The transfer company exercised an independent calling, routed the deliveries, took other deliveries with those of the defendant, received an agreed compensation per hundred weight, and the defendant exercised no control over it. A driver, in making a delivery, negligently left some radiators in the sidewalk space, and the plaintiff fell over them and was injured. It is *held* that the transfer company was an independent contractor and the defendant is not liable on the doctrine of *respondeat superior*.

—Winters v. American Radiator Co. 508.

## MASTER AND SERVANT—Continued.

32. The evidence was ample to sustain the finding of the trial court that respondent was an employee of relator.

—State ex rel. v. District Court of St. Louis County, 43.

## MECHANIC'S LIEN.

## RIGHT TO LIEN.

1. Under the rule stated in *Capehart v. Foster*, 61 Minn. 132, 63 N. W. 257, that lighting fixtures do not become a part of the realty, at least under ordinary circumstances where they are not designed for the particular building, it is *held* that the value of such electric lighting fixtures was improperly included in the amount adjudged to be a lien upon the property.

—*Lyons v. Westerdahl*, 289.

2. An architect who, under contract with the owner of land, furnishes plans and specifications for the construction of a building thereon is entitled to a lien upon the building and land upon which it is constructed, though he does not supervise the construction.

—*Lamoreaux v. Andersch*, 261.

- 2a. If the owner, after the plans are furnished, of his own volition and without fault of the architect, abandons the construction of a building on the land, the architect has a lien on the land. An actual improvement is not necessary to a lien.

—*Lamoreaux v. Andersch*, 261.

## TIME FOR FILING LIEN.

3. Where there is an entire contract, a lien cannot be filed until the full performance of the contract by the lien claimant.

—*Lamoreaux v. Andersch*, 268, 269.

4. The contract between the architect and the owner was that the former should furnish plans and specifications for and supervise the construction of the building for an entire consideration, based on a percentage of the total cost. The lien statement was filed within 90 days after the owner repudiated the contract. It is *held* that such statement was filed in time, though the last work on the plans and specifications was done more than 90 days prior thereto.

—*Lamoreaux v. Andersch*, 261.

## FORFEITING RIGHT TO LIEN.

5. One of the lien claimants performed his contract only in part, but filed a lien for the amount which would have been due had he performed the contract in full. *Held*, that he knowingly claimed more than was

## MECHANIC'S LIEN—Continued.

justly due, and thereby divested himself of all right to a lien against the property. G. S. 1913, § 7085. That section must be given effect according to its terms.

—Lyons v. Westerdahl, 289, 291.

## EVIDENCE OF DAMAGE TO CONTRACTOR CAUSED BY DELAY.

6. A firm of building contractors was delayed by the mistake of plaintiff in furnishing terra cotta for the front of a building under construction, and claimed greatly increased expense in doing the work because of inclement weather. They built a false front about 14 feet back from the front of the building, so that the building could be warmed and work done in winter. *Held*: The court erred in refusing plaintiff's offer to prove by competent evidence that it was feasible at a small additional expense to construct a false front so as to enclose the entire front of the building and permit the construction of the front without increased expense on account of the weather, and that this was the usual method of doing such work.

—Hydraulic-Press Brick Co. v. Haynes Bread Co. 405.

## ENFORCEMENT.

7. To entitle either of the contractors to pay for their own time during the delay, peculiar and exceptional circumstances must be shown.

—Hydraulic-Press Brick Co. v. Haynes Bread Co. 407.

8. Where the contractor was required to heat the building, when necessary, on account of the weather, and by reason of such delay the work was done in December instead of November, plaintiff should have been charged only with the additional cost of the heating in December over what would have been the cost, had the work been done in November.

—Hydraulic-Press Brick Co. v. Haynes Bread Co. 407.

## VERIFICATION.

## See PLEADING, 1.

9. In an action to foreclose a mechanic's lien the pleading may or may not be verified, but the bill of items must be verified. G. S. 1913, § 7031.

—Lyons v. Westerdahl, 290.

10. The trial court did not err in denying motions to strike out the several answers in a proceeding to foreclose a mechanic's lien on the ground that the bill of items was not verified as required by section 7031, G. S. 1913, where each answer was verified and stated that a true and correct statement of these items of labor and material furnished, was thereto attached.

—Lyons v. Westerdahl, 290.

**MECHANIC'S LIEN—Continued.**

11. Where, in such action, a party verifies his pleading by an affidavit that the averments therein are true of his own knowledge, and such pleading states positively that the attached bill of items is true and correct, this constitutes a sufficient verification of such bill of items.

—Lyons v. Westerdahl, 288.

**MINOR.****ATTRACTIVE NUISANCE.**

See NEGLIGENCE, 1.

**MISTAKE.** See REFORMATION OF INSTRUMENT, 1.

**MORTGAGE.** See APPEAL AND ERROR, 19.

**GRANTING TRUSTEE LEAVE TO MORTGAGE.**

See TRUST, 5.

**DECLARATION BY MORTGAGOR.**

See EVIDENCE, 5.

**EQUITABLE MORTGAGE.**

1. The plaintiff, having an option to purchase a lot, entered into an arrangement with the defendants whereby title was to be taken in the name of one of them, and held as security for advances to the plaintiff, and this was done. It is held that by this arrangement an equitable mortgage was created.

—Tenvoorde v. Tenvoorde, 126.

**FORECLOSURE BY ADVERTISEMENT.**

2. Plaintiff executed two mortgages on real property; the latter one being for commissions in securing the former, and containing no power of sale. There was default in both mortgages, and the commission mortgage was attempted to be foreclosed by advertisement. The mortgagee purchased at the sale, and at the end of a year went into possession. He and his grantees remained in peaceable possession for more than five years, paid taxes, made improvements, and paid off and procured to be satisfied the prior mortgage. Defendant purchased the land for a valuable consideration, without actual notice of the invalidity of the foreclosure. Plaintiff at all times knew of the attempted foreclosure, of the facts before stated, and of the defect which rendered the foreclosure invalid; but he remained silent, not asserting any title or right in the land until he commenced this action to redeem. The prop-

**MORTGAGE—Continued.**

erty in the meantime had greatly increased in value. It is *held* that plaintiff is estopped by his conduct from asserting title to the land or the right to redeem.

—Purcell v. Thornton, 255.

**MORTGAGEE IN POSSESSION.**

3. The grantee of a purchaser in good faith at a void foreclosure sale who went into possession is regarded as a mortgagee in possession.

—Purcell v. Thornton, 258.

**ACTION TO REDEEM FROM FORECLOSURE.**

See MORTGAGE, 2.

**REDEMPTION BY MORTGAGOR.**

4. A mortgagor's legal title is not affected by an attempted void foreclosure, and his right to redeem therefrom continues until the right to foreclose is barred by statute, unless his title is lost by abandonment or unless he is estopped from asserting such title.

—Purcell v. Thornton, 258.

**ACTION TO SET ASIDE FORECLOSURE UPON HOMESTEAD.**

See JUDGMENT, 3.

5. A money judgment was docketed against the husband of the defendant in whose name title was taken, and the court directed that the amount due upon this judgment be taken from the amount necessary to be paid in redemption by the plaintiff, and deposited in court to await the determination of the claim of the judgment creditor to the land if such claim should be asserted. *Held* error.

—Ten Voorde v. Ten Voorde, 126.

6. The evidence justifies a finding that an arrangement such as is recited was made.

—Ten Voorde v. Ten Voorde, 126.

**MOTION.** See APPEAL AND ERROR, 7, 11; COSTS, 2; JUDGMENT NOTWITHSTANDING VERDICT, 2; MECHANIC'S LIEN, 10; NEW TRIAL, 2; PARTITION, 5.

**MOTION TO DISMISS.**

See FRAUDS (STATUTE OF), 6.

**MOTOR VEHICLE.** See AUTOMOBILE.

**MUNICIPAL CORPORATION.**

**ASSESSMENT FOR LOCAL IMPROVEMENT.**

See EMINENT DOMAIN, 4-6, 8.

**MUNICIPAL CORPORATION—Continued.****HOME RULE CHAPTER.**

See **ELECTION.**

**VIOLATION OF ORDINANCE.**

See **NEGLIGENCE, 3.**

**OBSTRUCTION IN STREET.**

See **MASTER AND SERVANT, 31.**

**USE OF STREET—PASSENGER STRUCK BY AUTOMOBILE.**

1. Issues of defendant's and plaintiff's negligence in an action to recover damages for personal injuries alleged to have been caused by defendant's negligent operation of an automobile, whereby it collided with plaintiff just after he had alighted from a street car, *held*, under the evidence, for the jury.

—Daly v. Curry, 449.

**DEFECT IN STREET.**

2. Second street in the city of St. Paul extends along the brow of the bluff fronting the Mississippi river. Defendant railway company had dug away the face of the bluff up to, or nearly up to, the curb on the south side of the street, and defendant city had full knowledge thereof. A heavy truck driven by plaintiff's intestate backed against the curb, which gave way and precipitated the truck and driver to the bottom of the bluff, killing the driver. *Held*: That the curb was a part of the street; that whether the support of the curbing had been so weakened as to create a dangerous defect in the street was a question for the jury; that an instruction to return the same verdict as to both defendants was correct; that the verdict is sustained by the evidence; and that no errors appear in the record.

—Kimball v. City of St. Paul, 95.

**SIDEWALK—ABSENCE OF GUARD-RAIL—EMBANKMENT.**

See **BRIDGE, 1.**

3. Evidence, in an action against a city to recover damages for injuries resulting from a fall from an unguarded elevated sidewalk constructed along an embankment, *held* to show actionable negligence on the part of defendant. The expense to the city is no excuse for nonperformance of its duty.

—Watson v. City of Duluth, 446, 448.

**NAVIGABLE WATER.** See **EMINENT DOMAIN, 2.**

**NEGLIGENCE.** See CUSTOM, 1; MASTER AND SERVANT, 6, 9, 10, 13, 16, 23, 27;  
MUNICIPAL CORPORATION, 1, 3.

OF ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR, 3.

OF BAILEE.

See BAILMENT.

OF CITY IN FAILING TO PROVIDE GUARD RAIL.

See BRIDGE, 1.

OF MASTER AND FELLOW SERVANT.

See CARRIER, 6.

OF FELLOW SERVANT.

See MASTER AND SERVANT, 5, 29.

OF INDEPENDENT CONTRACTOR.

See MASTER AND SERVANT, 31.

OF LANDOWNER IN DRAINING SURFACE WATER.

See WATER AND WATERCOURSE, 1.

OF MASTER IN FAILING TO WARN SERVANT OF DANGER.

See MASTER AND SERVANT, 14, 15.

OF TRAINMEN.

See MASTER AND SERVANT, 26.

OF VICE PRINCIPAL.

See MASTER AND SERVANT, 16.

NEGLIGENCE PER SE.

See ANIMAL, 1.

WHAT CONSTITUTES DUE CARE.

See MASTER AND SERVANT, 7.

EXERCISE OF DUE CARE.

See ENGINEER; HIGHWAY, 3; NEGLIGENCE, 4.

ATTRACTIVE NUISANCE.

1. The owner of a mill pond who permits children to use as a play ground the ice formed thereon in winter is not liable for the death of a child from falling into a hole caused by the ordinary operation of the mill,

**NEGLIGENCE—Continued.**

even though the dust from the mill has caused the hole and the ice about it to become so covered with dust that it is impossible for the eye to distinguish between the ice and the water.

—Kohler v. W. J. Jennison Co. 133.

**PROXIMATE CAUSE.**

See **BRIDGE, 2; HIGHWAY, 1; MASTER AND SERVANT, 26.**

2. Where a statute is enacted for the protection of individuals, one who violates it is liable to those for whose protection it was intended for injuries proximately resulting from its violation; and the question of liability is a question of proximate cause.

—Schaar v. Conforth, 460.

**CONTRIBUTORY NEGLIGENCE.**

See **ANIMAL, 4; CARRIER, 1; MASTER AND SERVANT, 14, 15, 19; NEGLIGENCE, 4.**

3. The violation of a statute or ordinance is not held in this state conclusive evidence of contributory negligence.

—Schaar v. Conforth, 462.

**IMPUTED NEGLIGENCE.**

See **CARRIER, 6.**

4. The negligence of a driver of a vehicle is not imputed to a passenger riding therein; nevertheless the passenger is required to exercise reasonable care for his own safety. To charge him conclusively with contributory negligence, when about to cross a railroad track, in failing to see an approaching train, something more than ability to see the train and failure to look must be shown. In general, a mere gratuitous passenger should not be found guilty of contributory negligence as a matter of law, unless he in some way actively participates in the negligence of the driver, or is aware that the driver is incompetent or careless, or unmindful of some danger known to or apparent to the passenger, or is not taking proper precaution, and, being so aware, fails to warn or admonish the driver, or to take proper steps to preserve his own safety. Contributory negligence in this case held a question of fact for the jury.

—Carnegie v. Great Northern Railway Co. 14.

**EVIDENCE.**

See **MASTER AND SERVANT, 9.**

**NEGLIGENCE—Continued.**

5. There was no fatal variance between the allegations of negligence and the proof.

—*Bombolis v. Minneapolis & St. Louis Railroad Co.* 112.

**VERDICT—WHERE DEFENDANT EMPLOYER IS CHARGED WITH THE SAME NEGLIGENCE AS DEFENDANT SERVANT AND WITH ADDITIONAL NEGLIGENCE.**

See **CARRIER**, 6.

**NEW TRIAL.** See **ADVERSE CLAIM**, 1; **APPEAL AND ERROR**, 2; **CRIMINAL LAW**, 14; **JUDGMENT NOTWITHSTANDING VERDICT**, 2.

**BECAUSE OF ABSENCE OF DEFENDANT FROM TRIAL.**

See **JUDGMENT**, 1.

**BECAUSE OF INADEQUATE DAMAGES.**

See **EMINENT DOMAIN**, 17.

1. Where the district court interpreted the decision upon the former appeal as not necessitating a new trial, relator's remedy to review that interpretation is by appeal and not by *mandamus*.

—*State ex rel. v. District Court of Hennepin County*, 530.

**WAIVER OF ERROR.**

2. If, after verdict, the unsuccessful party moves for judgment notwithstanding the verdict, but does not move in the alternative for a new trial, he cannot on appeal be awarded a new trial. By resting solely upon his motion for judgment, he waives all errors which would be ground only for a new trial.

—*Northwestern Marble & Tile Co. v. Williams*, 514.

**ARGUMENT OF COUNSEL.**

3. Trial court's refusal to grant defendant a new trial on account of remarks made by plaintiff's counsel during argument of his motion for an adjournment, in order to enable him to procure expert testimony upon the practicability of guarding the machine, *held* not reversible error; the jury having been promptly directed not to consider the remarks, ample opportunity having thereafter been afforded for inspection of the machine, and the experts making the same having been allowed to testify in the case.

—*Graseth v. Northwestern Knitting Co.* 245.

**NEW TRIAL—Continued.****CHARGE TO JURY.**

4. A new trial was rightly granted for error in submitting to the jury the question whether the tear duct of the injured child was destroyed, there being no evidence that it was.

—Schaar v. Conforth, 461.

**AMOUNT OF JUDGMENT.**

5. Action by the purchaser of leased land to compel the vendor to account for the proceeds of the crops thereon received from the tenant after the contract of sale. A new trial was granted unless the vendor consented to judgment against him for the amount found by the trial court less deduction for the payments made by him.

—Pioneer Loan & Land Co. v. Cowden, 307.

**NOTICE.** See **BAILMENT**; **EMINENT DOMAIN**, 18.

**OF DEFECT IN STREET.**

See **MUNICIPAL CORPORATION**, 2.

**OF PUBLIC RECORD.**

See **PUBLIC LAND**, 4.

**OF RIGHTS OF OCCUPANT OF LAND.**

See **VENDOR AND PURCHASER**, 5.

**KNOWLEDGE THAT ANIMAL IS VICIOUS.**

See **ANIMAL**, 3.

**KNOWLEDGE OF PRIOR ACTION.**

See **ATTORNEY AND CLIENT**, 8.

**OF EXPIRATION OF REDEMPTION.**

See **ADVERSE CLAIM**, 1; **TAXATION**, 3-6.

**OF TAXATION OF COSTS.**

See **APPEAL AND ERROR**, 5.

**TO SURRENDER POSSESSION.**

See **FORCEIBLE ENTRY AND UNLAWFUL DETAINER**.

**NUISANCE.** See **NEGLIGENCE**, 1.

**OPTION.** See **EVIDENCE**, 2.

**TO BUY.**

See **MORTGAGE**, 1; **VENDOR AND PURCHASER**, 1, 2.

**OPTION—Continued.**

**TO INCREASE OR DIMINISH INSURANCE.**

See EVIDENCE, 9; INSURANCE, 4.

**OF MAKING SALE AT SPECIFIED PRICE.**

See BROKER, 2.

**MODIFICATION OF OPTION BY PAROL.**

See APPEAL AND ERROR, 18.

**PARENT AND CHILD.**

**ADMISSION OF CHILD NOT BINDING ON PARENT.**

See EVIDENCE, 4.

**PECUNIARY LOSS OF PARENT.**

See DEATH, 2.

**PARTITION.**

**SUSPENSION OF RIGHT.**

1. The right to compel a partition may be suspended for a limited time by express agreement, or by acquiring the property for, or devoting it to, some purpose which will be defeated by a partition; but such right is not suspended by the existence of an interest in the property, or of a right to occupy or use it, which may continue and be given effect notwithstanding the partition.

—Hunt v. Meeker County Abstract & Loan Co. 208.

**RIGHT OF COTENANT TO COMPEL PARTITION.**

2. A cotenant has the right to compel a partition of the common property unless such right has been suspended or waived by some agreement, in respect to the property, made by himself or by one through whom he claims.

—Hunt v. Meeker County Abstract & Loan Co. 207.

3. Under and pursuant to a contract made at the time of the construction of the building in controversy, plaintiff is in possession of the second floor thereof and defendant of the first floor thereof. It is held that their respective rights of occupancy under this contract may exist after partition the same as before, and that plaintiff may compel a partition, but that such partition will be subject to such rights of occupancy.

—Hunt v. Meeker County Abstract & Loan Co. 208.

4. Cotenants may make any agreement they choose in respect to the use by each other of the common property, but such agreements do not
- 128 M.—39.

**PARTITION—Continued.**

constitute a partition thereof unless they provide or contemplate that title to specific portions thereof shall vest in such cotenants in severalty.

—Hunt v. Meeker County Abstract & Loan Co. 207.

**COSTS OF ACTION.**

5. Costs in an action to determine whether plaintiff had a right to enforce a partition of real estate are not expenses of making the partition, within the meaning of G. S. 1913, § 8037. Hence, a motion to vacate the levy of an execution upon a judgment for costs in such action must be denied.

—Hunt v. Meeker County Abstract & Loan Co. 539.

**PATENT.****ENTRY OF PUBLIC LAND UNDER POWER OF ATTORNEY.**

See PUBLIC LAND, 5, 6.

**PAYMENT.**

By CHECK.

See ESTOPPEL.

**PAYMENT INTO COURT.** See MORTGAGE, 5.

**PHYSICIAN AND SURGEON.**

EXPERT TESTIMONY.

See EVIDENCE, 13.

PRIVILEGE AS WITNESS.

See WITNESS, 3.

**PLEADING.**

MOTION TO DISMISS.

See FRAUDS (STATUTE OF), 6.

COMPLAINT.

See CONTRACT, 8; EMINENT DOMAIN, 12; PUBLIC LAND, 2; WORK AND LABOR, 3.

ANSWER.

See LOG AND LOGGING, 5; PLEADING, 5.

## PLEADING—Continued.

## AMENDMENT OF ANSWER.

See TRIAL, 4.

## ANSWER—MOTION TO STRIKE OUT.

See MECHANIC'S LIEN, 10.

1. In an action to foreclose a mechanic's lien the verification of an answer stated that affiant had read the pleading and that it was true of his own knowledge. *Held*: The verification was not defective in failing to state that affiant knew the contents of the pleading which he verified.

—Lyons v. Westerdahl, 290.

## REPLY.

See EXECUTOR AND ADMINISTRATOR, 2; TRIAL, 4.

2. Action for death of plaintiff's intestate. Answer that defendant compromised and settled with B., who was duly appointed by the probate court of the county special administrator of the estate of deceased. Reply, a general denial, and an admission that the probate court did grant a form of order assuming to appoint B. as special administrator. *Held*: The reply was sufficient to put in issue the validity of the pretended order.

—Bombolis v. Minneapolis &amp; St. Louis Railroad Co. 118.

## DEMURRER.

See DISMISSAL AND NONSUIT, 1; EXECUTOR AND ADMINISTRATOR, 3; MANDAMUS, 2.

## JOINT DEMURRER.

3. A complaint is good against a joint demurrer if a cause of action is stated against any defendant; and a joint demurrer by the holder of a timber cutting permit and his sureties on a statutory bond will be overruled if a cause of action is stated against such holder, though none is stated against the sureties.

—State v. Brooks-Scanlon Lumber Co. 300.

## GENERAL DENIAL.

See CORPORATION, 7.

## PROOF OF ALLEGATIONS.

4. Where a complaint pleaded a contract and the answer admitted it, it was not necessary for plaintiff to prove it.

—Pioneer Land &amp; Loan Co. v. Cowden, 309.

**PLEADING—Continued.****OFFER OF PROOF CONTRADICTORY TO ADMISSIONS OF PLEADING.**

5. A general offer of proof must be considered in connection with the pleadings of the party making it. It is no error to reject proof offered by a party where his pleadings admit the facts to be to the contrary. *Held*, an offer by defendant to prove want of consideration for a note was properly rejected, because, under the admissions of the answer, the evidence offered could not properly be received.

—Wadsworth v. Walsh, 241.

**VERIFICATION.**

See **MECHANIC'S LIEN**, 9, 11; **PLEADING**, 1.

**POSSESSION.** See **TROVER AND CONVERSION**, 2.

**MORTGAGEE IN POSSESSION.**

See **MORTGAGE**, 2, 3.

**BY VENDEE UNDER CONTRACT OF SALE.**

See **ASSIGNMENT**, 1; **FRAUDS (STATUTE OF)**, 4.

**BY VENDEE AND HIS RIGHT TO SHARE OF CROP.**

See **VENDOR AND PURCHASER**, 3.

**NOTICE TO SURRENDER.**

See **FORCIBLE ENTRY AND UNLAWFUL DETAINER**.

**DECLARATION OF PERSON NOW DEAD.**

See **EVIDENCE**, 5.

**POWER OF ATTORNEY.****ENTRY OF PUBLIC LAND UNDER POWER.**

See **PUBLIC LAND**, 4-6.

**PRESCRIPTION.****PRESCRIPTIVE RIGHT TO USE DITCH.**

See **DRAIN**, 3.

**PRINCIPAL AND AGENT.****ADMISSION BY AGENT.**

See **EVIDENCE**, 6.

**PRINCIPAL AND SURETY.** See **PLEADING**, 3.

## PUBLIC LAND.

## TRESPASS ON STATE LAND.

See STATUTE, 1.

1. Section 5302, G. S. 1913, is not unconstitutional, as in contravention of article 4, § 27, of the Constitution, providing that "no law shall embrace more than one subject, which shall be expressed in its title."

—State v. Brooks-Scanlon Lumber Co. 300.

2. A complaint alleging that one cut timber upon state lands without the permit required by Laws 1895, c. 163, § 7 (R. L. 1905, § 2442), states a cause of action in trespass, though words equivalent to "wrongfully" or "wilfully" are not used; and the holder of such a permit, lawfully in possession for the purpose of cutting timber of not less than a specified size, is a trespasser in cutting timber of less than such size.

—State v. Brooks-Scanlon Lumber Co. 300.

3. By Laws 1905, c. 204, § 43 (G. S. 1913, § 5302), all limitation upon the time for bringing suit for a trespass on state lands is removed; and the statute is applicable to the holder of a state permit under section 2442 who cuts timber of less than the specified size, though the trespass was prior to its enactment.

—State v. Brooks-Scanlon Lumber Co. 300.

## ENTRY OF LAND UNDER POWER OF ATTORNEY.

4. Where an irrecoverable power of attorney to enter land ceded by the Chippewa Indian treaty of 1855 was on record, a person buying from the donor of the power or from his heirs is chargeable with notice and cannot invoke the protection of a good-faith purchaser.

—Kipp v. Love, 502.

5. Following *Nicholson v. Congdon*, 95 Minn. 188, 103 N. W. 1034, and *Rogers v. Clark Iron Co.* 104 Minn. 198, 116 N. W. 739, it is held that the right and privilege given to certain persons under the Chippewa treaty of February 22, 1855, to locate and enter 160 acres of land in the ceded territory, was assignable, and that an irrevocable power of attorney, executed by the one entitled to this right for a valuable consideration, which released to the donee of the power all of the donor's beneficial interests to be derived from the exercise of such right, passed the legal title to the donee to land subsequently located, entered, and patented thereunder, although, according to the prevailing practice of the United States land office, the entry was made and the patent issued in the name of the donor of the power.

—Kipp v. Love, 498.

6. The finding that the actual location and entry was made by the donee in the power of attorney is sustained by the evidence, and the finding that

**PUBLIC LAND—Continued.**

the prevailing practice of the United States land office required patents to issue in the name of the person given the right of entry by the treaty, although such right had been assigned, is considered not material, even if it should not be held that such practice prevailed to such an extent that courts are charged with judicial knowledge thereof.

—Kipp v. Love, 498.

**PUBLIC POLICY.**

**SOLICITING BUSINESS BY ATTORNEY.**

See **CHAMPERTY AND MAINTENANCE.**

**AGREEMENT BETWEEN ATTORNEY AND CLIENT.**

See **CONTRACT, 3.**

**PUBLIC USE.** See **EMINENT DOMAIN, 1.**

**QUANTUM MERUIT.** See **WORK AND LABOR, 3.**

**RAILWAY.**

**RATES OF PASSENGER FARE UNDER LAWS 1913, P. 775, C. 536.**

See **CARRIER, 8, 9; MANDAMUS, 2; WORDS AND PHRASES, 4.**

**ACCIDENT AT RAILWAY CROSSING.**

See **NEGLIGENCE, 4.**

**INJURY TO SERVANT.**

See **COMMERCE, 2; FEDERAL EMPLOYER'S LIABILITY ACT, 1, 2; FEDERAL SAFETY APPLIANCE ACT; MASTER AND SERVANT, 6, 9, 25, 26, 29.**

**VENUE OF ACTION AGAINST RAILWAY.**

See **COURT (MUNICIPAL).**

**RAPE.** See **CRIMINAL LAW, 12, 13.**

**REDEMPTION.**

**ACTION TO REDEEM FROM FORECLOSURE SALE.**

See **MORTGAGE, 2.**

**NOTICE OF REDEMPTION FROM TAX SALE.**

See **TAXATION, 3.**

**REFORMATION OF INSTRUMENT.**

1. A written contract may be reformed where there has been an actual agreement upon terms, and the writing fails to express those terms, because of mutual mistake, or mistake on one side and fraud or inequitable conduct on the other. To justify the court in reforming a written contract on oral testimony, the proof must be clear, unequivocal and convincing; more than a mere preponderance of evidence is required. This is especially true in a case where an attorney asks for the reformation of a contract written by himself and where the other party stands in a relation akin to that of client. Applying these rules, the finding of the trial court that this contract represented the agreement of the parties, cannot be disturbed.

—Barnum v. White, 58.

2. A contract may be reformed where the parties used the words they intended to use, but through mistake these words do not express the meaning they intended to convey. The evidence does not establish a case of reformation within this rule.

—Barnum v. White, 58.

**REGISTRATION OF TITLE.**

1. The evidence justifies a finding that the tax certificates and tax deed, through which appellant claims title to the parcels of land in controversy, were derived from dealings in tax certificates and tax matters concerning the same land, and other lands, within the terms of a certain written contract made between appellant's grantor or assignor and two other persons in the name of one Covell.

—Midway Realty Co. v. City of St. Paul, 135.

2. The finding is also sustained that the one who negotiated with the city of St. Paul to sell or exchange said parcels of land was authorized by the others interested therein to make the deal.

—Midway Realty Co. v. City of St. Paul, 135.

**RELEASE.**

OF CLAIM FOR PERSONAL INJURY.

See COMPROMISE AND SETTLEMENT, 3.

**REMOVAL OF CAUSE.**

1. The right to remove a cause from state to Federal courts is derived from United States statutes and whether a case is made for removal is a Federal question.

—Ewert v. Minneapolis & St. Louis Railroad Co. 78.

2. An order of the district court transferring a cause to the Federal district

**REMOVAL OF CAUSE—Continued.**

court, upon petition made and bond filed by a foreign corporation, is not appealable. The appeal is dismissed.

—Ewert v. Minneapolis & St. Louis Railroad Co. 77.

**REPLEVIN. See CONTRACT, 2.****ACTION AGAINST JOINT OWNER.**

Replevin does not lie against a joint owner, or tenant in common, of an article of personal property.

—Wilkes v. Holmes, 349.

**RES GESTAE. See EVIDENCE, 6.****RESPONDEAT SUPERIOR. See MASTER AND SERVANT, 24, 31.****REVOCATION.****RESERVATION IN DEED OF POWER OF REVOCATION.**

See TRUST, 4.

**RIPARIAN RIGHT. See EMINENT DOMAIN, 2.****ROBBERY. See CRIMINAL LAW, 14.****RULE.****DUTY OF MASTER TO ENFORCE RULES,**

See MASTER AND SERVANT, 5, 12, 13.

**SALARY. See WORKMEN'S COMPENSATION ACT, 6, 7.****SALE.****BY FOREIGN CORPORATION.**

See COMMERCE, 1.

**INVESTIGATING CREDIT OF NEW CUSTOMER.**

See CUSTOM, 2.

**OFFER AND ACCEPTANCE.**

1. An offer to buy which requires acceptance must be accepted within a reasonable time. Where it is understood that the goods to be bought are wanted within two weeks, evidence that an offer to buy was not accepted

**SALE—Continued.**

until 30 days after it was made, sustains a finding that acceptance was not within a reasonable time.

—S. F. Bowser & Co. v. Fountain, 198.

**CONTRACT TERMINABLE AT WILL.**

2. A contract by one party to sell goods to another as ordered, but for no fixed period, is terminable at will of either party, and no right to damage can be predicated on its termination.

—Victor Talking Machine Co. v. Lucker, 171.

**ACCEPTANCE OF TERRA COTTA MADE TO ORDER.**

3. A carload of defective building material was shipped by plaintiff to defendant building contractors, who, without examining the material while on the car, sent a drayman to haul it to the building for which it was intended. When the first load arrived at the building, they discovered the defect, and thereupon conferred with the owner of the building, and, being informed that the use of such material would not be permitted, they reloaded upon the car all the material removed therefrom and immediately returned the entire carload to plaintiff. *Held*, that unloading a portion of the defective material under such circumstances did not constitute an acceptance thereof.

—Hydraulic-Press Brick Co. v. Haynes Bread Co. 401.

**BREACH BY SELLER—DAMAGES.**

4. It was error to exclude testimony tending to show that the damages resulting from plaintiff's failure to deliver material on time could have been lessened by proper effort on the part of the contractors.

—Hydraulic-Press Brick Co. v. Haynes Bread Co. 402.

5. Plaintiff, having contracted to manufacture and deliver certain building material not obtainable in the market, and having failed to deliver such material at the time agreed upon, is liable to the contractors for the additional expense necessarily incurred in consequence of such default; but the damages should be limited to such necessary additional expense, and should not include any expense which could have been avoided by reasonable effort on the part of the contractors.

—Hydraulic-Press Brick Co. v. Haynes Bread Co. 402.

6. The amount allowed against plaintiff as damages is excessive for the reason that expenses are included therein which did not necessarily result from plaintiff's delay in delivering the material.

—Hydraulic-Press Brick Co. v. Haynes Bread Co. 402.

7. Action for deceit. The complaint that the charge implied that defendants,

**SALE—Continued.**

by trick or artifice, had prevented plaintiff from discovering the condition of the property, is not well founded.

—Bragg & Co. v. Goldstein, 64.

**SCHOOL AND SCHOOL DISTRICT.**

CITY OF ST. PAUL.

See ELECTION.

**SET-OFF AND COUNTERCLAIM.** See ABANDONMENT, 2; CONTRACT, 10.

**SPECIFIC PERFORMANCE.** See APPEAL AND ERROR, 18; DRAIN, 4; FRAUDS (STATUTE OF), 4.

1. Plaintiff having elected, within the time prescribed, to sell the stock back to defendant, and having made proper and sufficient tender of the stock and agreement, both before the bringing of the action and on the trial thereof, the fact that the agreement theretofore was lacking in mutuality of remedy did not deprive the court of the power to decree its specific performance.

—First National Bank of Hastings v. Corporation Securities Co. 342.

2. Mutuality of remedy is not the sole test of specific enforceability, and is not always essential thereto.

—First National Bank of Hastings v. Corporation Securities Co. 342.

3. A contract for the purchase of shares of stock may be specifically enforced at the instance of the seller, where the difficulty in ascertaining the value of the stock is such that his remedy by action at law to recover damages for breach of contract is inadequate.

—First National Bank of Hastings v. Corporation Securities Co. 342.

4. The finding of the trial court that the stock in suit was of such uncertain value as to warrant specific enforcement of defendant's contract to purchase it, sustained.

—First National Bank of Hastings v. Corporation Securities Co. 342.

**STAGING.** See MASTER AND SERVANT, 8, 10, 11.

**STATE.**

ACTING AS PARENS PATRIÆ.

See INCOMPETENT, 3.

STATUTE. See FORFEITURE; TAXATION, 9.

CONSTRUCTION OF AMBIGUOUS STATUTE.

See CARRIER, 8, 9.

TITLE OF ACT.

See PUBLIC LAND, 1.

1. "An act relating to the sale of timber on state lands, defining trespass thereon and prescribing penalties therefor," is not obnoxious to Const. art. 4, § 27, as a title which embraces more than one subject. The provision for a limitation is germane to the subject—something proper to be included in the statute and not foreign to its title.

—State v. Brooks-Scanlon Lumber Co. 303.

2. The inheritance tax statute, as amended, does not infringe the constitutional provision that "no law shall embrace more than one subject, which shall be expressed in its title," nor the equality provisions of the state or Federal Constitution, nor the provision against impairing the obligation of contracts.

—State ex rel. v. Probate Court of St. Louis County, 372.

VIOLATION OF STATUTE.

See HIGHWAY, 1-4.

STATUTES CITED BY THE COURT.

UNITED STATES STATUTES AT LARGE.

10 St. 1165. Chippewa Indian treaty of 1855 .....	498, 501
27 St. 531. Federal Safety Appliance Act .....	283, 284, 286
35 St. 65. Federal Employer's Liability Act .....	77, 112, 113, 114
	118, 119, 121, 125, 283, 284, 332, 333, 338, 360, 361, 362, 363

CONSTITUTION OF MINNESOTA.

Art. 1, § 13. Private property for public use .....	435
Art. 4, § 27. Laws to embrace but one subject .....	300, 303
Art. 4, § 33. Special legislation prohibited .....	91, 316
Art. 4, § 33, subd. 7. Special laws for granting corporate powers or privileges, except to cities .....	87, 91
Art. 4, § 36. Home rule charters .....	82, 83, 84, 88, 89, 92, 93
Art. 7, § 8. Elective franchise—women .....	82, 84, 92, 93, 94
Art. 8, § 1. Uniform system of public schools .....	82, 84, 85
Art. 8, § 2. School lands .....	88
Art. 8, § 3. Same—township .....	82, 84, 85, 88
Art. 9, § 1. Taxes to be uniform upon same class of subjects .....	385

## STATUTES CITED BY THE COURT—Continued.

## REVISED STATUTES 1878.

c. 32, § 64. Log liens—conditions .....	8
---	---

## GENERAL STATUTES 1894.

§ 5185. Venue—public service corporations .....	227
---	-----

## REVISED LAWS 1905.

§ 2007. Railroads—charges for transportation to be reasonable .....	28
§ 2009. Same—same—preferences forbidden .....	28
§ 2017. Carrier—"long and short haul" .....	29
§ 2442. Trespass on state lands—penalty .....	300, 301, 303
§ 2733. Negotiable instruments—rate of interest .....	35
§ 3526. Log lien—termination .....	5, 8, 9
§ 3702. Special administrator .....	117
§ 4095. Venue—public service corporations .....	227
§ 4195. Dismissal of action .....	67, 68
§ 4198. New trials—grounds .....	489
§ 4457. Foreclosure by advertisement—limitation .....	258
§ 4600. Competency of witness—physician .....	364

## GENERAL STATUTES 1913.

§ 183. Venue .....	227
§ 272. Municipal courts—powers and duties .....	225, 226, 227, 228
§ 1345. City charter .....	91
§ 1354. Commission form of city government .....	90
§ 1988. Property classified for purpose of taxation .....	384
§ 2148. Taxes—notice of expiration of redemption .....	237
§ 2632. Motor vehicles—stopping on signal .....	460, 464, 465
§ 2634. Same—rules of the road .....	460, 461, 463, 465
§ 2754. Board of education—exemption of cities under home rule charters .....	91
§ 3874. Scaffolds .....	71, 73
§ 4285. Railroads—charges for transportation to be reasonable .....	28
§ 4332. Same—same—preferences forbidden .....	28
§ 4347. Carrier—"long and short haul" .....	29
§ 4955. Attorney's lien .....	354, 355, 356, 358
§ 5302. Limitation of actions .....	300, 301, 302, 303
c. 41, §§ 5395-5428. Eminent domain .....	66, 67
§ 5397. Same .....	417
§ 5409. Same—judgment .....	323
§ 5523. County ditches—powers of board .....	70

## STATUTES CITED BY THE COURT—Continued.

§ 5531. Same—report—final hearing .....	70
§ 5534. Same—appeal to district court .....	70
§ 5589. Same—meandered lake—appeal .....	70
§ 5805. Debts—rate of interest .....	35
§ 6206. Foreign corporation doing business in Minnesota .....	171, 172
§ 6207. Same .....	171, 172
§ 6208. Same .....	171, 172
§ 6998. Statute of frauds—no action on agreement .....	468, 471, 473
§ 7002. Same—conveyance of land .....	473
§ 7003. Same—lease of land .....	471, 473
§ 7020. Mechanic's lien .....	264
§ 7021. Same—amount .....	264
§ 7022. Same—railway, etc. ....	264
§ 7023. Same—when lien attaches—notice .....	264, 268
§ 7024. Same—vendors .....	264
§ 7026. Same—statement .....	265, 269
§ 7027. Same—two or more buildings .....	265
§ 7028. Same—foreclosure by action .....	265
§ 7029. Same—summons .....	265
§ 7031. Same—bill of particulars .....	290
§ 7058. Log lien—to whom granted .....	7
§ 7059. Same—statement .....	6, 7
§ 7060. Same—termination .....	5, 8
§ 7085. Mechanic's lien—amount .....	201
§ 7227. Probate practice .....	116
§ 7271. Probate of will contested—witnesses .....	17
§ 7293. Special administrator .....	117
§ 7400. Executor or administrator—discharge .....	5
§ 7433. Guardian for insane or incompetent person .....	327
§ 7674. Real party in interest may sue .....	345
§ 7721. Venue—railroads .....	225, 227
§ 7756. Answer—contents .....	7
§ 7774. Actions by or against corporations—proof of incorporation ...	75
§ 7805. Five-sixths jury law .....	112, 118
§ 7825. Dismissal of action .....	49, 50, 66, 67, 68
§ 7828. New trials .....	489, 490
§ 7998. Judgment notwithstanding verdict—objection to instructed verdict .....	466, 467, 515
§ 8001. Appeals to supreme court .....	488, 489, 490
§ 8001, subd. 7. Same .....	321, 322
§ 8028. Partition .....	211
§ 8037. Same—apportionment of costs .....	539

## STATUTES CITED BY THE COURT—Continued.

§ 8041. Same—sale .....	211
§§ 8202-8230. Workmen's Compensation Act .....	486
§ 8208. Same—dependents—allowances .....	338, 339, 340
§ 8228. Same—liability of employers .....	47
§ 8230. Words and phrases—employer and employee .....	47
§ 8375. Competency of witness .....	364, 431
§ 8375, subd. 1. Husband and wife—no testimony against each other without consent .....	190
§ 8378. Conversations with deceased person .....	21, 281
§ 8393. Depositions—defects .....	525, 530
§ 8462. Defendant's confession insufficient, without evidence that of- fense has been committed .....	167
§ 8504. Convict—witness .....	478

## SESSION LAWS—GENERAL.

1876, p. 100, c. 89, § 2. Log lien—conditions .....	8
1895, p. 352, c. 163, § 7. Trespass on state lands—penalty, 300, 301, 303	
1899, p. 433, c. 342. Log lien—statement .....	8, 9
1905, p. 273, c. 204, § 43. Limitation of actions .....	300, 301, 302
1911, p. 278, c. 200, § 2, subd. 2. Inheritance tax—reciprocal exemp- tion .....	374, 383
1911, p. 458, c. 331. Railroads—transportation—maximum rate .....	30
1911, p. 497, c. 365, § 13. Motor vehicles—lights, brakes, etc. ....	460
1911, p. 498, c. 365, § 15. Same—rules of the road ...	460, 461, 463, 465
1911, p. 516, c. 372. Inheritance tax .....	378
1913, p. 114, c. 104, § 138. Change of venue .....	226
1913, p. 458, c. 316, § 13. Scaffolds .....	71, 73
1913, p. 488, c. 345. Acquisition of lands for parks, etc. ....	532
1913, p. 681, c. 467, § 14. Workmen's Compensation Act .....	221, 487
1913, p. 688, c. 467, § 30. Same—procedure in case of dispute .....	224
1913, p. 692, c. 467, § 34. Words and phrases—employer and employee	47
1913, p. 699, c. 474. Appeals to supreme court .....	488, 489, 490
1913, p. 710, c. 483. Property classified for purposes of taxation, 384, 385	
1913, p. 775, c. 536. Transportation of passengers—maximum rate ...	25
	26, 30
1913, p. 799, c. 552. Venue—railroads .....	227
1913, p. 690, c. 467, § 32. Employer and employee—third person ....	47

## SESSION LAWS—SPECIAL.

1881, p. 49, c. 11. Village of Duluth .....	317
1881, (Ex. Sess.) p. 212, c. 200. Duluth street railway .....	314
	315, 316, 317, 319

STATUTES CITED BY THE COURT—Continued.

- 1883, p. 219, c. 80, § 3. Village of Duluth ..... 317  
 1891, p. 268, c. 36. City of St. Paul—board of education, 83, 84, 88, 90, 92

PENNSYLVANIA.

- 5 Purdon's Dig. of Statutes (13th ed.) 5299, 5300. Tax on collateral inheritance ..... 374

WISCONSIN.

- G. S. 1913, § 2394-8. Workmen's Compensation Act ..... 158, 160, 162  
 G. S. 1913, § 2394-29. Same ..... 162

STIPULATION.

A ledger was properly admissible in evidence under the stipulation of the parties, and the entries therein offered sustained the findings of the trial court.

—Finch, Van Slyck & McConville v. Le Sueur County Co-operative Co. 74.

STREET RAILWAY. See EVIDENCE, 11; MUNICIPAL CORPORATION, 1.

CONDITION OF FRANCHISE NOT PERFORMED.

1. The Duluth Street Railway Co. did not construct, equip and have in operation one mile of its street railway within one year after the granting of its franchise, in accordance with the condition expressed in it.  
 —State ex rel. v. Duluth Street Railway Co. 314.
2. The village waived strict performance of the condition.  
 —State ex rel. v. Duluth Street Railway Co. 314.

EXTENSION OF FRANCHISE.

See CORPORATION, 1.

FORFEITURE OF FRANCHISE.

3. The franchise granted to the Duluth Street Railway Company (Sp. Laws [Ex. Sess.] 1881, c. 200, approved November 17, 1881) was upon the express condition that if it failed to construct, equip and have in operation one mile of street railway within one year it should, without any act on the part of the state or the village of Duluth, forfeit to the village all of the rights, privileges and immunities granted. It was provided that the grant, when accepted, should be a contract between the state and the village and the company. It is held that the forfeiture was not executed *ipso facto* upon a failure to perform the condition strictly on time, so that there could be no waiver of the strict perform-

**STREET RAILWAY—Continued.**

ance of the condition, or of a forfeiture, but that the condition was in the nature of a condition subsequent subject to waiver.

—State ex rel. v. Duluth Street Railway Co. 314.

**CONSTRUCTION OF FRANCHISE.**

4. The act of 1881 constitutes a valid franchise, exclusive in character, in the Duluth Street Railway Company, and such franchise expires on October 17, 1931.

—State ex rel. v. Duluth Street Railway Co. 314.

**CLASSIFICATION OF PROPERTY FOR TAXATION.**

See TAXATION, 1.

**SURRENDER.****OF LEASE.**

See LANDLORD AND TENANT, 2.

**TAXATION.****ADMINISTRATOR'S FAILURE TO PAY TAXES.**

See EXECUTOR AND ADMINISTRATOR, 3.

**ASSESSMENT OF STREET RAILWAY PERSONALTY.**

1. Under Laws 1913, c. 483 (G. S. 1913, § 1988), classifying property for purposes of taxation, relator's street railway tracks, overhead feed and trolley wires, trolley poles and underground conduits and cables, are assessable under class 4, at 40 per cent of true value, this class including property not enumerated in the first three; and such property does not come within "tools, implements and machinery whether fixtures or otherwise" included in class 3 and assessable at 33½ per cent of true value.

—State ex rel. v. Minnesota Tax Commission, 384.

**CLASSIFICATION OF PROPERTY.**

2. Under the Constitution the classification for taxation purposes must be reasonable and such as is based on essential differences; and the differences between the relator's property used in its street railway and that included in class 3 are such as to justify the legislature in making the classification and it is not unconstitutional.

—State ex rel v. Minnesota Tax Commission, 384.

**PAYMENT OF TAXES.**

See CONTRACT, 11.

## TAXATION—Continued.

## NOTICE OF REDEMPTION FROM TAX SALE.

See ADVERSE CLAIM, 1.

3. A notice of the expiration of the time of redemption in a tax proceeding, which is ambiguous and misleading as to the exact amount required to redeem, is nugatory.  
—Kipp v. Love, 498.
4. A notice to eliminate the right of redemption in a tax proceeding examined, and *held* to accurately state the amount required to redeem.  
—Fortier v. Parry, 235.
5. Where the land has been bid in by the state and afterwards assigned to a private purchaser, the notice of redemption should state the amount paid upon the assignment and not the amount for which the land was bid in by the state. The notice is not required to state the amount paid by the assignee for subsequent delinquent taxes, although these must be included in the amount specified as required to make redemption.  
—Fortier v. Parry, 237.
6. Notices of redemption are not required to be numbered. It is done by the auditor for his own convenience. In the absence of proof of prejudice to an interested party, unnecessary matters in notices of this kind may be eliminated as surplusage.  
—Fortier v. Parry, 238.

## TAX CERTIFICATE AND TAX DEED.

See REGISTRATION OF TITLE, 1.

## INHERITANCE TAX.

See CONSTITUTION, 2.

7. The state has undoubted power to impose a succession tax in respect to all property upon which it has power to impose an ordinary tax, and, in addition thereto, it has power to impose a succession tax in respect to certain sorts of intangible property upon which it cannot impose such ordinary tax.  
—State ex rel. v. Probate Court of St. Louis County, 381.
8. The Minnesota inheritance tax is not a tax upon property, but a tax upon the right of succession thereto.  
—State ex rel. v. Probate Court of St. Louis County, 381.
9. The language of our statute indicates an intention on the part of the legislature to impose a succession tax in all cases in which it has the power to impose such tax, and the statute cannot be construed as applying to such cases.  
—128 M.—40.

**TAXATION—Continued.**

plying only where the devolution of the property is governed by our laws.

—State ex rel. v. Probate Court of St. Louis County, 372.

10. The devolution of debts owed by residents of this state, whether evidenced by promissory notes or not, and of the stock of corporations of this state, and of the stock of national banks located in this state, is subject to a succession tax in this state, although the debts were owing to, and the stock was held by, nonresident decedents.

—State ex rel. v. Probate Court of St. Louis County, 372.

11. A nonresident decedent's personal property having a situs in this state is subject to the succession tax of this state, although the devolution of such property is governed by the law of the decedent's domicile.

—State ex rel. v. Probate Court of St. Louis County, 372, 378.

**SAME—RECIPROCAL EXEMPTION.**

12. The reciprocal exemption amendment to our inheritance tax law, made in 1911, applies only where the laws of another state impose an inheritance tax upon "transfers of personal property of decedents" but "exempt or do not impose a tax upon transfers of personal property of residents of Minnesota having its situs in such state"; and the laws of another state which impose such tax only where the property passes to collateral relatives or strangers, but do impose such tax where personal property within such state, belonging to residents of Minnesota, passes by will to such collateral relatives or strangers, do not bring the property of residents of that state within such exemption.

—State ex rel. v. Probate Court of St. Louis County, 371.

13. Two things are necessary to bring the residents of a foreign state within the exemption granted by Laws 1911, p. 278, c. 209, § 2, subd. 2. Such state must in fact collect a succession tax, and it must not collect such tax from personal property within its jurisdiction belonging to citizens of Minnesota. If the foreign state either does not collect such tax upon the transfer of property belonging to its own citizens, or does collect it upon the transfer of personal property belonging to the citizens of Minnesota, the exemption does not apply.

—State ex rel. v. Probate Court of St. Louis County, 377.

**TENANT IN COMMON.** See **PARTITION**, 1-4.

**ACTION AGAINST.**

See **REPLEVIN**.

**TENDER.** See **SPECIFIC PERFORMANCE**, 1.

**TIME.****OF FILING LIEN STATEMENT.**

See LOG AND LOGGING, 2.

**TITLE.** See ABANDONMENT, 1; BILLS AND NOTES; DEED, 2; PARTITION, 4; PUBLIC LAND, 5.

**OF PURCHASER AT VOID FORECLOSURE SALE**

See MORTGAGE, 3.

**TOOL.** See TAXATION, 1.

**TORT.**

Plaintiff's cause of action against his master for personal injury is one in tort. As to such actions the law is well settled that the liability, or right of action, is determined by the law of the place where the injury is inflicted, without regard to the law of the forum, or the law of the place where the contract was made.

—Johnson v. Nelson, 161.

**TRADE MARK AND TRADE NAME.**

Competition in trade is lawful. One man may seek the business of competitor and may tell the trade not to buy of his competitor, so long as he indulges in no threat, coercion, misrepresentation, fraud, or other harassing means.

—Victor Talking Machine Co. v. Lucker, 171.

**TRESPASS.** See ANIMAL, 2; PUBLIC LAND, 2, 3.

**TRIAL.****STRIKING CAUSE FROM CALENDAR.**

1. There being no cause pending in the state district court after the removal to the Federal court, an order striking it from the calendar of the court was right, and is affirmed.

—Ewert v. Minneapolis & St. Louis Railroad Co. 77.

**MOTION TO DISMISS ACTION.**

See FRAUDS (STATUTE OF), 6.

**MOTION TO STRIKE OUT PORTIONS OF COMPLAINT.**

See CONTRACT, 8.

**MOTION TO STRIKE OUT ANSWER.**

See MECHANIC'S LIEN, 10.

**ELECTION BETWEEN CAUSES OF ACTION.**

See CONTRACT, 8.

## TRIAL—Continued.

## MISCONDUCT OF COUNSEL.

See APPEAL AND ERROR, 2; CRIMINAL LAW, 4, 5; NEW TRIAL, 3.

2. There was no abuse of discretion in the court's decision in the matter of the misconduct of counsel.

—Blakely v. J. Neils Lumber Co. 467.

## OFFER OF PROOF.

See PLEADING, 5; WITNESS, 4.

3. An offer of proof should not be technically construed, but it must fairly advise the court of the proof which the party is prepared to furnish.

—Wadsworth v. Walsh, 244.

## REOPENING OF CASE—AMENDMENT OF ANSWER.

4. The court committed no prejudicial error in permitting the answer to be amended after the evidence was submitted, for the evidence was admissible under the original answer. Nor did the court abuse its discretion in refusing to open the case and hear testimony upon the issues attempted to be raised by the reply to the amended answer, for no proper issue not already fully litigated and available to plaintiff was made by such reply.

—Kipp v. Love, 498.

## EVIDENCE.

See INCOMPETENT, 3.

## INCOMPETENT EVIDENCE.

5. The rule that incompetent evidence, received without objection, is sufficient upon which to base a finding or verdict, applies only when such evidence establishes or tends to establish an enforceable right.

—Hanson v. Marion, 468.

6. It has no application where the fact shown or proven by the incompetent evidence furnishes no basis for recovery or of a right of action, as an oral agreement within the statute of frauds which the statute declares unenforceable.

—Hanson v. Marion, 468.

## COURT READING PLEADINGS TO JURY.

See APPEAL AND ERROR, 25.

## CHARGE TO JURY.

See MASTER AND SERVANT, 25; WORDS AND PHRASES, 2.

## TRIAL—Continued.

## SAME—REFERENCE TO INTEREST OF WITNESSES.

7. The rule that special reference in the charge of the court to a particular witness, with the admonition to consider his interest in the result of the action, is error, does not apply where the court in such connection names practically all the witnesses so interested.

—Moe v. Paulson, 277.

8. Instructions to a jury to take into consideration the interest of a witness in the outcome of the litigation should be in general terms, and not by reference to a particular witness.

—Moe v. Paulson, 282.

## QUESTION NOT FOR JURY.

9. The evidence did not justify a submission to the jury of the question whether the log carriage in defendant's sawmill was run at a high and dangerous rate of speed; and there was error in submitting it.

—Johnson v. Sartell Brothers Co. 239.

## REQUEST TO SUBMIT ISSUES TO JURY.

10. Where there is an objection to an instructed verdict under section 7998, G. S. 1913, the objecting party is not required to request the submission of particular issues to the jury. Such requests may be made, but in the absence thereof the trial court will proceed and submit such issues as are presented by the pleadings and evidence, as the court deems proper.

—Blakely v. J. Neils Lumber Co. 466.

11. No prejudicial error is found in the charge, or in the refusal to give certain requested instructions.

—Klemik v. Henricksen Jewelry Co. 491.

## DIRECTED VERDICT.

12. The purpose of G. S. 1913, § 7998, was to abolish the practice of directing verdicts at the close of the trial. Where objection is made the court should proceed and submit the issues to the jury under the usual and appropriate instructions.

—Blakely v. J. Neils Lumber Co. 467.

## FIVE-SIXTHS JURY LAW.

13. The five-sixths jury law applies in an action in the state court based upon the Federal statute, following *Winters v. Minneapolis & St. L. R. Co.* 126 Minn. 260, 148 N. W. 106.

—Bombolis v. Minneapolis & St. Louis Railroad Co. 112.

**TRIAL—Continued.****REQUEST TO CHARGE JURY.**

See **WORDS AND PHRASES**, 2.

14. The court properly declined to give instructions which were either inaccurate or not applicable to the facts of the case.

—Doran v. Chicago, St. Paul, Minneapolis & Omaha Railroad Co. 193.

**LITIGATION OF ISSUE BY CONSENT.**

15. The issue of waiver was litigated by consent.

—Shama v. Chicago, Milwaukee & St. Paul Railway Co. 522.

**VERDICT—EFFECT OF VERDICT AGAINST DEFENDANT EMPLOYEE AND IN FAVOR OF DEFENDANT EMPLOYEE.**

See **CARRIER**, 6.

**VERDICT AGAINST BOTH DEFENDANTS.**

See **MUNICIPAL CORPORATION**, 2.

**QUESTION OF FACT FOR THE COURT.**

See **APPEAL AND ERROR**, 17.

**FINDINGS OF COURT.**

See **APPEAL AND ERROR**, 12; **LOG AND LOGGING**, 3.

**AMENDMENT OF FINDINGS.**

See **LOG AND LOGGING**, 4.

**TROVER AND CONVERSION.****ADVERTISING GOODS FOR SALE.**

See **BAILMENT**.

1. To constitute a conversion of personal property of another there must be some exercise of the right of complete ownership and dominion over it, to the total exclusion of the rights of the owner, or else some act done which destroys it or changes its character or in some way deprives the owner of it permanently or for an indefinite length of time.

—Brandenburg v. Northwestern Jobbers Credit Bureau, 411.

2. Conversion may be proved by demand and refusal of possession, but evidence of this is not necessary, if there is other evidence of actual conversion.

—Brandenburg v. Northwestern Jobbers Credit Bureau, 411.

**TRUST.****ACTION TO SET ASIDE TRUST DEED.**

1. Plaintiff executed to defendant a deed of certain property in trust for

**TRUST—Continued.**

the uses and purposes therein expressed; the main object and purpose of the trust was to relieve plaintiff, then well along in years, and in failing health, of the burden of managing the property and to preserve it for her heirs to be distributed to them in equal shares at her death. Two years thereafter, through guardians duly appointed by the probate court, plaintiff brought this action to set the trust deed aside on the ground that she was mentally incompetent and incapable of understanding the transaction, and that the deed was obtained by undue influence. It is *held* that the evidence supports the findings of the trial court that plaintiff was competent to enter into the transaction, that she fully understood the same, and that the deed was not obtained by undue influence.

—Butler v. Badger, 99.

**CONSTRUCTION OF TRUST DEED—TRUSTEE'S INDEPENDENCE OF COURT.**

2. A further clause relieving the trustee from interference by the courts in respect to the ordinary management of the affairs of the trust has reference to mere details, and was not intended to exempt the trustee from the control of the court in respect to substantial transactions.

—Butler v. Badger, 100.

3. An attempt wholly to exclude the authority of the courts to control the conduct of the trustee, and to vest in him arbitrary authority to sell and dispose of the estate in harmony with his own pleasure and without regard to the best interests of the estate, would probably cause the trust deed to be declared void, at least to the extent of such grant of arbitrary power.

—Butler v. Badger, 105.

**TRUST DEED—CAPACITY OF GRANTOR.**

4. The absence of a clause reserving in plaintiff the power of revocation did not invalidate the deed. The absence of such a provision was an item of evidence or circumstance bearing upon the issue whether the deed was the deliberate act of plaintiff, and of her mental capacity to enter into the agreement.

—Butler v. Badger, 100.

5. An order granting leave to the trustee to mortgage a part of the property for the purpose of raising funds to pay claims, and the order of the court making such mortgage take precedence of plaintiff's notice of *lis pendens*, *held* authorized by the application therefor.

—Butler v. Badger, 100.

**UNDUE INFLUENCE.** See **DEED**, 1; **TRUST**, 1; **WILL**, 1.

**USURY.**

Where notes are claimed to be usurious, and there is no expressed or actual intent as to whether the governing law of the transaction is the law of one state or another, to either of which it may with propriety be referred in part, and there is no attempt to evade the usury law, the court will indulge the presumption that the law of the state which upholds the transaction is the law intended by the parties; and applying this rule it is held that the law of Montana, under which the transaction involved was valid, was the proper law of the contract where purchase-money notes were made to a corporation of that state, secured on lands located there, sold to a South Dakota corporation, having an office in Minnesota, under the laws of which the transaction was invalid, though the negotiations were had in Minnesota, and the notes executed and payable there, and the trust deed securing them executed there to a Minnesota trust company as trustee.

—Green v. Northwestern Trust Co. 31.

**VALUE.** See **MECHANIC'S LIEN**, 1; **SPECIFIC PERFORMANCE**, 3, 4.

**OF BROKER'S SERVICES.**

See **BROKER**, 2.

**OF STOCK.**

See **SPECIFIC PERFORMANCE**, 3.

**VARIANCE.** See **CONTRACT**, 8; **CRIMINAL LAW**, 10; **NEGLIGENCE**, 5; **WORK AND LABOR**, 3.

**VENDOR AND PURCHASER.**

**GOOD FAITH PURCHASER.**

See **MORTGAGE**, 2; **PUBLIC LAND**, 4.

**OPTION TO BUY.**

1. Where a lease contains an option to purchase the property, the obligations assumed under the lease constitute a sufficient consideration for the option.

—Murphy v. Anderson, 106.

2. An option for the purchase of a particular parcel of land at a specified price per acre is not void for uncertainty as the acreage can be determined by measurement, and the price is payable at the time the option is exercised.

—Murphy v. Anderson, 107.

**VENDOR AND PURCHASER—Continued.**

**POSSESSION UNDER CONTRACT OF SALE.**

See **ASSIGNMENT**, 1.

**POSSESSION AND RIGHT TO SHARE OF CROP.**

3. Where a contract of sale in terms gave possession to vendee "by assignment of lease," this language operated to assign the vendor's lease or cropping contract and to deliver possession of the land subject to it. It gave to vendee the right to the owner's share of the crop for the season then beginning.

—Pioneer Loan & Land Co. v. Cowden, 309.

4. By the terms of a cropping contract, or lease, the owner was to receive one-quarter of the crop and the tenant three-quarters, the owner to pay one-quarter of the threshing bill and on November 1 pay 75 cents an acre for plowing all land in crop during that year. By a verbal agreement after the lease but before the sale, the owner agreed to pay for breaking land put into crop. After the sale, the vendor received the proceeds of the crop and paid all these charges. In an action by the purchaser to compel him to account, *held* that the vendee is entitled to recover only the net amount after deducting such payments, and the right to these deductions was properly pleaded.

—Pioneer Loan & Land Co. v. Cowden, 307.

**NOTICE TO PURCHASER.**

5. A purchaser of real estate, who has knowledge of facts sufficient to put him upon inquiry as to the rights of another therein, and who fails to make such inquiry, is chargeable with notice of such rights and his purchase is subject thereto. Under this rule, the purchase by defendant Rustad was subject to the equitable rights of plaintiff.

—Murphy v. Anderson, 107.

**ACTION FOR BREACH OF CONTRACT—DEFENSE.**

6. Where an executory contract of sale is pleaded in the complaint and admitted in the answer, it is not material in determining the rights of the parties between themselves whether or not the registry tax has been paid.

—Pioneer Loan & Land Co. v. Cowden, 307.

**VENUE.**

**CHANGE OF VENUE.**

See **COURT (MUNICIPAL)**; **CRIMINAL LAW**, 7; **MANDAMUS**, 1.

**VERIFICATION.** See **MECHANIC'S LIEN**, 9, 10; **PLEADING**, 1.

**WAIVER.** See **APPEAL AND ERROR**, 8; **CARRIER**, 4; **FRAUDS (STATUTE OF)**, 7; **JUDGMENT NOTWITHSTANDING VERDICT**, 2; **NEW TRIAL**, 2; **PARTITION**, 2; **STREET RAILWAY**, 2, 3; **TRIAL**, 15; **WITNESS**, 1.

**WATER AND WATERCOURSE.** See **DRAIN**, 1; **NEGLECTANCE**, 1.

**INTERFERENCE WITH NAVIGATION.**

See **EMINENT DOMAIN**, 2.

**SURFACE WATER.**

1. A landowner may rid his land, for any legitimate purpose, of surface waters, even to the injury of the land of another, but in doing so he must use all reasonable means to avoid unnecessary injury to the land of others. If it be practicable to deliver the water drained into a natural drain or watercourse, it is the duty of the landowner to do so, but circumstances may justify him in cutting through a watershed or in draining a marsh or pond that has no natural outlet.

—Hopkins v. Taylor, 511.

2. The evidence in this case sustains the findings of the trial court that the route taken by defendant in draining a marsh with no natural outlet was the most natural and feasible one, and that defendant used all reasonable means in constructing his drain so as not unnecessarily to injure plaintiff's land, and plaintiff's prayer for an injunction restraining the improvement was properly denied.

—Hopkins v. Taylor, 511.

**WILL.**

**LITIGATION TO BREAK WILL.**

See **ATTORNEY AND CLIENT**, 1.

**TESTAMENTARY CAPACITY.**

1. In a will contest case, the evidence is considered and *held* sufficient to support the verdict of the jury to the effect that testatrix was mentally competent to make the will, and that it was not procured by undue influence.

—Moe v. Paulson, 277.

2. The charge of the court stated the rules of law applicable to the case with substantial correctness and without reversible error.

—Moe v. Paulson, 277.

**TESTIMONY REGARDING TESTATOR'S STATEMENTS.**

3. It was error to permit a legatee under the will to testify to statements made by the testator at the time he executed the will, but the validity

**WILL—Continued.**

of the will was conclusively established outside such testimony, and the error was without prejudice.

—Madson v. Christenson, 18.

**EXAMINATION OF ATTESTING WITNESSES.**

4. The attesting witnesses are not necessarily the witnesses of the proponent in the sense in which that expression is usually understood. They are witnesses provided for by law, and the court is entitled to such information as they may impart. The proponent of a will is required to call them, although he may know that they will testify against him.

—Madson v. Christenson, 20.

5. The statute requires that all subscribing witnesses, "who are within the state and competent and able to testify, shall be produced and examined." Where the proponent called a subscribing witness and examined him as to the manner in which the will was executed, the failure to examine him as to the sanity of the testator will not defeat the will, if such sanity be proven by other evidence. By calling him as a witness, his testimony was made available, and, if contestants desired his testimony upon matters omitted by proponent, it was incumbent upon them to examine him in respect thereto.

—Madson v. Christenson, 17.

**EVIDENCE IN CASE OF CONTEST.**

6. Where a will is contested, neither party is limited to the testimony of the subscribing witnesses, and either party may present other evidence to overcome the adverse testimony of such witnesses. The questions in controversy are to be determined from all the evidence bearing thereon, and not from the testimony of the subscribing witnesses only.

—Madson v. Christenson, 17.

**WITNESS.****EXAMINATION OF ATTESTING WITNESS.**

See WILL, 4, 6.

**EXAMINATION OF ADVERSE PARTY.**

See INCOMPETENT, 2.

**CONVERSATION WITH DECEASED PERSON—EXAMINATION OF PARTY INTERESTED IN ACTION.**

1. Where a party who is entitled to object to evidence of a conversation with a deceased person, by a person interested in the event of the action,

**WITNESS—Continued.**

calls such witness and cross-examines him in reference to such conversation, he thereby waives the right to object to a full statement of the entire conversation. In *re Hess' Estate*, 57 Minn. 282, 59 N. W. 193, followed.

—*Moe v. Paulson*, 277.

2. The rule applies even though the questions put to the witness were intended to call only for statements made by him to the deceased. Such statements are necessarily a part of the conversation, and by calling them out the other party is entitled to the whole conversation.

—*Moe v. Paulson*, 277.

**PRIVILEGED COMMUNICATION—PHYSICIAN AND PATIENT.**

3. The testimony of physicians making an examination of the plaintiff to ascertain his physical ability to work on a railroad, their information not being obtained for the purpose of treating or acting for him, is not privileged, and it was error to exclude it.

—*Cherpeski v. Great Northern Railway Co.* 360.

**CROSS-EXAMINATION—REFUSAL TO ANSWER.**

See DEPOSITION.

**CROSS-EXAMINATION.**

See CRIMINAL LAW, 6; INCOMPETENT, 2; WITNESS, 1.

4. Petition of attorneys of plaintiff to compel defendant in a personal injury action which it had settled without notice to them, to pay their fees under its agreement with plaintiff to reimburse him for his attorney fees. *Held*: The court did not err in sustaining, on cross-examination of petitioners, objections to questions and offers of testimony relating to the conduct of petitioners in other cases, in soliciting claims against defendant, in stirring up litigation against it and discouraging amicable compromise and settlement of claims by it. These matters were irrelevant to the issue—petitioners' right to a lien.

—*Johnson v. Great Northern Railway Co.* 368.

**IMPEACHMENT.**

5. Conviction of any crime, whether felony or petty misdemeanor, may be proved in order to impeach a witness. The nature of the crime may properly be shown.

—*Thompson v. Bankers Mutual Casualty Insurance Co.* 475.

**INSTRUCTING JURY TO CONSIDER HIS INTEREST IN LITIGATION.**

See TRIAL, 7, 8.

WITNESS—Continued.

**FEE OF EXPERT.**

See APPEAL AND ERROR, 449.

WORDS AND PHRASES.

**"BY ASSIGNMENT OF LEASE."**

See VENDOR AND PURCHASER, 3.

**"CURRENT AND GENUINE MONEY."**

See CRIMINAL LAW, 10.

**"PROCEEDS."**

See CONTRACT, 7.

**"TOOLS, IMPLEMENTS AND MACHINERY WHETHER FIXTURES OR OTHERWISE."**

See TAXATION, 1.

**"WHOLLY DEPENDENT."**

See WORKMEN'S COMPENSATION ACT, 5.

**WHEN WORDS USED EXPRESS A MEANING NOT INTENDED.**

See REFORMATION OF INSTRUMENT, 2.

1. The court's remark in a criminal case: "I do not think there has been any lack of opportunity in this case to find out," referring to counsel's opportunity to ascertain the circumstances, construed to mean there had been no lack of opportunity for conference between attorney and client, and not to convey an insinuation that defendant was guilty.  
—State v. Roby, 192.
2. The court need not use the exact words of a proffered instruction. As long as the same thought is conveyed in clear and apt language the form or choice of words is of no great importance.  
—Klemik v. Henricksen Jewelry Co. 495.
3. The word "may" in section 247 of the Home Rule Charter of St. Paul.  
—State ex rel. v. District Court of Ramsey County, 435, 436, 438.
4. "Other" is an adjective that has various meanings and various shades of meaning. The word conveys the idea of "different or distinct from

## WORDS AND PHRASES—Continued.

that already mentioned," but is often used to express the idea of "additional" or "further." In the Bendixen maximum passenger rate law (G. S. 1913, §§ 4286, 4287), in the phrase "all other distances" it has the latter meaning.

—State ex rel. v. Chicago, Milwaukee & St. Paul Railway Co. 27.

## WORK AND LABOR. See MASTER AND SERVANT, 3.

1. The presumption is that services rendered by one member of a family to another are without expectation of pay, and that there can be no recovery for them. This presumption is overcome by proof of a promise to pay, express or implied in fact. In this case, conceding that the respondent, the wife of decedent's step-son, and decedent occupied the relation of members of a family, the evidence justified a finding of a contract to pay, implied in fact.

—Lansing v. Gregory, 496.

2. Action for the agreed value of certain labor and material. *Held*: No errors were committed on the trial, had in the absence of defendant, and the evidence supports the verdict.

—H. W. Johns-Manville Co. v. Great Northern Hotel Co. 311.

## ACTION UPON QUANTUM MERUIT.

3. Where a complaint declares upon a *quantum meruit* count for the reasonable value of services, and the evidence discloses that defendant agreed to pay a specified price therefor, this is at most a variance, and when it appears that defendant was not misled thereby to his prejudice, a recovery of the agreed price is proper.

—Meyer v. Saterbak, 304.

## WORKMEN'S COMPENSATION ACT. See CONSTITUTION, 2, 3.

## MINNESOTA ACT.

## KNOWLEDGE.

1. Plaintiff cannot plead ignorance of the laws of the state wherein his employment was performed, and under which alone his right to redress for the injury must be asserted.

—Johnson v. Nelson, 158.

2. The Workmen's Compensation Act is remedial in its nature, and must be given a liberal construction, to accomplish the purpose intended. The provisions defining when the relation of employer and employee exists bring within the act all cases in which, under the above rule, such relation is found to exist.

—State ex rel. v. District Court of St. Louis County, 43.

## WORKMEN'S COMPENSATION ACT—Continued.

## ELECTION BY SERVANT.

3. The defendant being under the act when plaintiff was requested to go to work in Wisconsin, the latter also elected to accept the provisions of the act, since he failed to give written notice to the contrary. The contract of hiring, as referred to in the Wisconsin act, must be considered made when the employment in Wisconsin was accepted.

—Johnson v. Nelson, 158.

4. In proceedings for compensation under Part 2 of the Workmen's Compensation Act (chapter 467, Laws 1913), it is *held* that the evidence supports the findings of the trial court to the effect that at the time of the accident and death complained of the relation of employer and employee existed between defendant and decedent; that the cause of death was accidental and while decedent was engaged in the course of his employment, and was not caused by decedent's intoxication.

—State ex rel. v. District Court of Meeker County, 221.

## CONSTRUCTION OF ACT.

5. The father of deceased was wholly incapacitated to contribute to the support of himself or his family. The mother had been a helpless invalid for over six years. An unmarried daughter paid the cost of her board and room. A married daughter with her child lived with plaintiffs, did all the household work and cared for her father and mother. For four months before the injury to her brother she received no compensation for her work. *Held*: A finding that plaintiffs, the parents of the deceased workman, were "wholly dependent" upon him for support, within the meaning of the Workmen's Compensation Act (G. S. 1913, § 8208, subs. 1, 2 and 3) was sustained by the evidence.

—State ex rel. v. District Court of Hennepin County, 338.

## SAME—PERCENTAGE BASED ON COMPENSATION.

6. The purpose of Part 2 of the Workmen's Compensation Act was to secure the widow, or dependent next of kin, of an employee who should meet an accidental death while engaged in the line of his employment, a percentage income based upon their pecuniary loss, and the salary or compensation actually received by such employee at the time of his death represents such loss.

—State ex rel. v. District Court of Sibley County, 486.

## SAME—NET SALARY AFTER PAYING ASSISTANT.

7. Where an employer pays to an employee having general charge of the affairs of the employer's business a fixed sum of money each month,

**WORKMEN'S COMPENSATION ACT—Continued.**

from which the employee is required to pay an assistant, if one is employed by him to assist in the work, such sum as may be agreed upon between the employee and the assistant, the sum so paid the assistant forms no part of the salary or compensation of the employee, and in determining the salary of such employee the amount paid the assistant must be deducted from the total amount paid by the employer.

—State ex rel. v. District Court of Sibley County, 486.

**WISCONSIN ACT.**

See **WORKMEN'S COMPENSATION ACT**, 3.

8. Plaintiff, on April 2, 1913, entered defendant's employ upon railroad construction work. He worked at two different places in this state. On June 26 of the same year he was asked to go to Wisconsin on similar work there being done by defendant. He accepted, and was injured four days thereafter. His original hiring was for no definite time, and for no particular place. On June 10 defendant had elected to accept the provisions of the Workmen's Compensation Act of Wisconsin. In this action to recover damages for the injury, alleged to have been caused by defendant's negligence, it is *held*, that plaintiff's right to damages or compensation depends upon the law of Wisconsin, where the injury was received.

—Johnson v. Nelson, 158.

**WRIT.** See **MANDAMUS**.

[End of Volume]

5016-105  
s





Harvard Law Library



